

No. 12966

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

UNITED STATES OF AMERICA,  
Appellant,  
vs.  
ESTHER WESTFALL,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
Western District of Washington,  
Northern Division.

FILED  
AUG 17 1951  
U.S. DISTRICT COURT  
SEATTLE, WASH.



No. 12966

---

United States  
Court of Appeals  
for the Ninth Circuit.

---

UNITED STATES OF AMERICA,  
Appellant,  
vs.  
ESTHER WESTFALL,  
Appellee.

---

Transcript of Record

---

Appeal from the United States District Court,  
Western District of Washington,  
Northern Division.



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amendment to Memorandum .....	27
Answer .....	12
Appeal:	
Certificate of Clerk to Record on .....	170
Motion to Extend Time for Docketing Record on .....	30
Notice of .....	29
Order Extending Time for Docketing Rec- ord on .....	32
Points to Be Relied Upon on.....	175
Application for Leave to Have Exhibits Con- sidered in Original Form .....	177
Certificate of Clerk to Record on Appeal .....	170
Complaint .....	3
Exhibits, Defendant's:	
D—Letter to Griffin and Griffin Dated June 21, 1948 .....	80
F—Teacher's Record of Employment ....	101
M—Statement of Beverly Bruck .....	141

INDEX	PAGE
Findings of Fact and Conclusions of Law . . . .	21
Judgment . . . . .	25
Memorandum of Court January 25, 1951 . . . .	18
Motion to Extend Time for Docketing Record on Appeal . . . . .	30
Affidavit of Dyer, Merritt G. . . . .	30
Motion for Order Directing Issuance of Sub- poena . . . . .	15
Names and Addresses of Counsel . . . . .	1
Notice of Appeal . . . . .	29
Order Denying Motion for New Trial . . . . .	27
Order Extending Time for Docketing Record on Appeal . . . . .	32
Order Re Exhibits . . . . .	179
Order for Subpoena of Witness and Payment of Fees . . . . .	16
Statement of Points to Be Relied Upon on Appeal . . . . .	175
Transcript of Proceedings at Trial . . . . .	33
Witnesses, Defendant's:	
Barton, Harold R.	
—direct . . . . .	92
—cross . . . . .	94
Bruck, Beverly	
—direct . . . . .	138
—cross . . . . .	142

INDEX

PAGE

Witnesses, Defendant's—(Continued):

Deasy, Katherine

—direct ..... 95

—cross ..... 96

Kail, Edward J.

—direct ..... 154

—cross ..... 154

McConville, Bernard E.

—direct ..... 125

—cross ..... 132

Speeres, Austin A.

—direct ..... 144

—cross ..... 151

—redirect ..... 152

—recross ..... 153

Wayman, Florence

—direct ..... 98

Westfall, Esther

—direct ..... 97

Yingling, Thomas Joseph

—direct ..... 102

—cross ..... 117, 134

—redirect ..... 136

—recross ..... 137

Witnesses, Plaintiff's:

Bruck, Mrs. W. C.

—direct ..... 65, 157

—cross ..... 66, 160

## INDEX

## PAGE

## Witnesses, Plaintiff's—(Continued) :

Holloway, Mrs. E. T.

—direct ..... 67, 161

—cross ..... 68

Lindahl, Wallace W.

—direct ..... 83

—cross ..... 87

Seering, A. H.

—direct ..... 72

—cross ..... 77

Sprecher, E. E.

—direct ..... 88

—cross ..... 91

Troxell, Laura

—direct ..... 62

—cross ..... 64

Westfall, Barbara Jean

—direct ..... 69, 162

Westfall, Esther

—direct ..... 34, 164

—cross ..... 45

—redirect ..... 60

—recross ..... 61

## NAMES AND ADDRESSES OF ATTORNEYS

J. CHARLES DENNIS,

VAUGHN E. EVANS,

JOHN E. BELCHER,

Attorneys for Appellant,

1023 U. S. Court House,

Seattle 4, Washington.

WILLIAM A. GRIFFIN,

1000 Eighth Ave., Suite 106,

Seattle, Washington, and

J. B. PENNINGTON,

801 Central Building,

Seattle 4, Washington,

Attorneys for Appellee.



In the United States District Court for the Western  
District of Washington

Number 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action  
against the defendant alleges as follows:

I.

That jurisdiction of this action is conferred upon  
this Court by the provisions of the Federal Tort  
Claims Act, specifically Section 1346, et seq., Title  
28, of the United States Code Annotated.

II.

That plaintiff is a resident of the City of Seattle,  
State of Washington.

III.

That there is and at all times herein mentioned  
was in full force and effect in the State of Wash-  
ington the following statutes:

Pierce's Perpetual Code of the State of Wash-  
ington, 1943:

Section 295-87. " 'Reckless' Manner Defined. It  
shall be unlawful for any person to operate a motor  
vehicle in a reckless manner over and along the

public highways of this state. For the purpose of this section to 'operate in a reckless manner' shall be construed to mean the operation of a vehicle upon the public highways of this state in such a manner as to indicate either a wilfull or wanton disregard for the safety of persons or property."

Section 295-89. " 'Negligent' Manner Defined. It shall be unlawful for any person to operate a motor vehicle in a negligent manner over and along the public highways of this state. For the purpose of this section to 'operate in a negligent manner' shall be construed to mean the operation of a vehicle upon the public highways of this state in such a manner as to endanger or be likely to endanger any persons or property. \* \* \*"

Section 296-1. "Prudent Driving-Conditions. (1) Every person operating or driving a vehicle of any character upon the public highways of this state shall operate the same in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of the traffic, weight of vehicle, grade and width of highway, condition of surface and freedom of obstruction to view ahead and consistent with any and all conditions existing at the point of operation so as not to unduly or unreasonably endanger the life, limb, property or other rights of any person entitled to the use of such public highways;

"Lawful Speeds. (2) Subject to the provisions of subsection (1) of this section and except in those

instances where a lower maximum lawful speed is provided by this act or otherwise, it shall be unlawful for the operator of any vehicle to operate the same at a speed in excess of the following:

“Twenty-Five Miles. (a) Twenty-five (25) miles per hour within the limits of incorporated cities and towns; \* \* \*

“Twenty Miles in Business Districts. (d) Twenty (20) miles per hour while traveling upon any public highway of any incorporated city or town and proceeding through any business district, when such business district is so sign posted at the extremities thereof;

“Fifty Miles Generally. (j) Fifty (50) miles per hour under all other circumstances.

“Care Always. Compliance with such speeds under the circumstances hereinabove set forth shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.

“Illegal Speed Prima Facie Reckless. The unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this section at the point of operation and under the circumstances described shall be prima facie evidence of the operation of a motor vehicle in a reckless manner by the operator thereof. \* \* \*”

#### IV.

That there is and at all times herein mentioned was in full force and effect in the City of Tacoma, Washington, the following ordinances:

The Charter and Official Code of the City of Tacoma, Washington, 1948, Traffic Code, Number 101: Ordinance 11701, Adopted June 14, 1939:

“Section 5. Nothing in this ordinance shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injury to person or property resulting from the negligent use of the public streets by the driver or operator of any motor vehicle or its owner or his employee or agent, and the owner of such vehicle shall be equally liable for the negligent operation thereof, when at the time of such injury the vehicle was operated by the agent of such owner, or by any person employed by him for the purpose of operating such vehicle. \* \* \*

“Section 8. Definitions. \* \* \*

“(7) ‘Business District’—The territory contiguous to and including the public highway, as herein defined, when fifty per cent (50%) or more of the frontage thereon on either side thereof for a continuous distance of three hundred (300) feet or more is occupied by buildings in use for business. \* \* \*

“Section 42. Lawful Speed, Care and Prudent Driving—(1) Every person operating or driving a vehicle of any character upon the public highways of the City of Tacoma shall operate the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of the traffic, weight of vehicle, grade and width of highway, con-

dition of surface and freedom of obstruction to view ahead and consistent with any and all conditions existing at the point of operation so as not to unduly or unreasonably endanger the life, limb, property or other rights of any person entitled to the use of such public highways; \* \* \*

“(2) Subject to the provisions of subsection (1) of this section and except in those instances where a lower maximum lawful speed is provided by this ordinance or otherwise, it shall be unlawful for the operator of any vehicle to operate the same at a speed in excess of the following:

“(a) Twenty-five (25) miles per hour upon any public highway within the City of Tacoma. \* \* \*

“(d) Twenty (20) miles per hour while traveling upon any public highway in the City of Tacoma and proceeding through any business district when such business district is so sign posted at the extremities thereof; \* \* \*

“(f) Twenty-five (25) miles per hour under all other circumstances.

“Compliance with such speeds under the circumstances hereinabove set forth shall not relieve the operator of any vehicle from the further exercise of due care and caution as further circumstances shall require.

“The unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this section at the point of operation and under the circumstances described shall be prima facie evidence of the operation of a motor vehicle in a reckless manner by the operator thereof. \* \* \*

“Section 80. Arterial Highways—(a) Those portions of the following streets are hereby designated as and declared to be arterial highways: \* \* \*

“South Tacoma Way from South M Street to South City Limits \* \* \*

“Section 120. Reckless Driving—It shall be unlawful for any person to operate a motor vehicle in a reckless manner over and along the public highways of the City of Tacoma. For the purpose of this section to ‘operate in a reckless manner’ shall be construed to mean the operation of a vehicle upon the public highways of this city in such a manner as to indicate either a wilfull or wanton disregard for the safety of persons or property.

“Section 120-A. (Added by Ordinance No. 11783, passed March 6, 1940.) It shall be unlawful for any person to operate a motor vehicle in a negligent manner over and along the public streets of the City of Tacoma. For the purpose of this section to ‘operate in a negligent manner’ shall be construed to mean the operation of a vehicle upon the public streets of the City of Tacoma in such a manner as to endanger or be likely to endanger any persons or property \* \* \*”

## V.

That on February 20, 1946, at the hour of approximately eight o'clock p.m. plaintiff was a passenger in a certain United States Army bus belonging to the defendant, and being used at the time to transport plaintiff and others from Seattle to Fort Lewis, Washington, for the purpose of pro-

viding recreation by way of entertainment for members of the United States Military Forces stationed at Fort Lewis. That such services were provided pursuant to request therefor made by the appropriate military authorities of Fort Lewis to and through the United Service Organizations of Seattle, Washington. That at all times herein mentioned said bus was driven and operated by an agent and employee of the defendant, to wit: a soldier in the United States Army, whose name is unknown to plaintiff, but who was at all times referred to acting within the scope of his employment and agency. That at the time and on the date last indicated the said employee of defendant was driving said bus in a southerly direction on South Tacoma Way, approaching what this plaintiff believes and therefore alleges to be the intersection of South Tacoma Way and South Thirty-eighth Street, in the City of Tacoma, Washington, said route being otherwise designated as United States Highway Number 99, an Arterial Highway, and that said area is a business district, designated as such according to law. That said employee of defendant was driving said bus in a negligent, reckless and unlawful manner; at an excessive and unlawful rate of speed, to wit: in excess of fifty (50) miles per hour; that when coming to a point near the intersection above referred to the said employee negligently, recklessly and unlawfully applied the brakes on the said bus and forced it violently and suddenly to stop. All of which negligent, reckless and unlawful acts and omissions of the defendant by and through its em-

ployee and agent as aforesaid resulted in plaintiff's being thrown suddenly and with great force from the seat occupied by her on said bus to the floor and to the front thereof.

#### VI.

That as a direct and proximate result of the negligence of the defendant through its agent and employee as aforesaid the plaintiff suffered and sustained injuries and damages as follows: Severe and permanent injury to the back, lower spine, left leg and ankle, bruises, contusions and severe nervous shock. All of which resulted in continuous and severe pain and suffering to this plaintiff, becoming progressively worse, incapacitating plaintiff in the pursuit of her work and in earning a living, requiring continuous medical treatment, all to this plaintiff's general damage in the amount of Nine Thousand Seven Hundred and Fifty Dollars (\$9,750.00.)

#### VII.

That as a further proximate result of the negligence of the defendant through its agent and employee as aforesaid plaintiff has necessarily sustained special damages for expenditures for hospitalization and medical treatment in the total sum of Two Hundred and Fifty Dollars (\$250.00), all of which amounts are reasonable.

#### VIII.

That by reason of the negligence of the defenant through its agent and employee as aforesaid, and the injuries and damages proximately resulting

therefrom, plaintiff has been damaged in the total sum of Ten Thousand Dollars (\$10,000.00).

## IX.

That the negligent and wrongful acts and omissions of the defendant through its agent and employee as aforesaid were contrary to the laws of the State of Washington and the ordinances of the City of Tacoma, in general, and of the parts thereof which are hereinabove set forth in particular, and the same were done under circumstances where the defendant, if a private person, would have been liable to the plaintiff for the injuries and damages proximately resulting therefrom.

Wherefore, plaintiff prays for judgment against the defendant in the sum of Ten Thousand Dollars (\$10,000.00), together with costs.

WILLIAM A. GRIFFIN,

MABEL B. GRIFFIN,

J. B. PENNINGTON,

By /s/ J. B. PENNINGTON,

Attorneys for Plaintiff.

State of Washington,  
County of King—ss.

Esther Westfall, being first duly sworn, on oath deposes and says:

That she is the plaintiff in the above entitled action; that she has read the foregoing complaint.

knows the contents thereof, and believes the same to be true.

/s/ ESTHER WESTFALL,  
Plaintiff.

Subscribed and sworn to before me this 18th day of April, 1950.

[Seal] /s/ MABEL B. GRIFFIN,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed April 21, 1950.

---

In the United States District Court of the Western  
District of Washington, Northern Division  
No. 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

### ANSWER

Comes now the defendant, United States of America, and for answer to the Complaint of the plaintiff, admits, denies and alleges as follows:

#### I.

Answering paragraph I of plaintiff's complaint, defendant admits the same.

II.

Answering paragraph II of plaintiff's complaint, defendant admits the same.

III.

Answering paragraph III of plaintiff's complaint, defendant alleges it does not have sufficient knowledge to form a belief as to the truth of the allegations therein contained and therefore denies the same.

IV.

Answering paragraph IV of plaintiff's complaint, defendant alleges it does not have sufficient knowledge to form a belief as to the truth of the allegations therein contained and therefore denies the same.

V.

Answering paragraph V of plaintiff's complaint, defendant admits plaintiff was a passenger on a bus being operated by an employee of the United States Army enroute to Fort Lewis on February 20, 1946, and further admits that at a point between the City of Tacoma and Fort Lewis, Washington, said bus came to a stop and the plaintiff fell from her seat and denies each and every other allegation contained therein.

VI.

Answering paragraph VI of plaintiff's complaint, defendant denies the same.

VII.

Answering paragraph VII of plaintiff's com-

plaint, defendant denies each and every allegation therein contained.

VIII.

Answering paragraph VIII of plaintiff's complaint, defendant denies each and every allegation therein contained.

IX.

Answering paragraph IX of plaintiff's complaint, defendant denies each and every allegation therein contained.

First Affirmative Defense

X.

That the proximate cause of plaintiff's injuries resulting from her fall from the seat to the floor of said bus was the negligence of the plaintiff.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff's action be dismissed and that defendant have judgment against the plaintiff for its costs and disbursements herein incurred, together with such other and further relief as the Court may deem just and equitable.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ VAUGHN E. EVANS,  
Assistant United States  
Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1950.

[Title of District Court and Cause.]

MOTION FOR ORDER DIRECTING  
ISSUANCE OF SUBPOENA

Comes now the defendant herein by J. Charles Dennis, United States Attorney, and John F. Dore, Assistant United States Attorney for the Western District of Washington, and moves the above-entitled Court for an order directing the Clerk of the above-entitled Court to issue subpoena for the appearance of Joseph Yingling, 2600 Llewelyn St., Baltimore, Md., to testify in the above-entitled Court at the trial of the above-entitled cause on January 9, 1951, and directing the United States Marshal to pay the mileage and expenses allowed by law of said witness.

This motion is based upon the records and files herein and upon the annexed affidavit of J. Charles Dennis.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ JOHN F. DORE,  
Assistant United States  
Attorney.

United States of America  
Western District of Washington  
Northern Division—ss.

J. Charles Dennis, being first duly sworn, on oath, deposes and says: That he is United States Attorney for the Western District of Washington,

and as such makes this affidavit on behalf of the defendant herein, United States of America; That Joseph Yingling, 2600 Llewelyn Street, Baltimore, Maryland, is a necessary and material witness for the defendant, and that the defendants cannot safely go to trial without having this witness present and available to testify for the defense.

/s/ J. CHARLES DENNIS.

Subscribed and sworn to before me this 19th day of December, 1950.

[Seal] /s/ WILLIAM FERGUSON,  
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed December 19, 1950.

---

[Title of District Court and Cause.]

## ORDER FOR SUBPOENA OF WITNESS AND PAYMENT OF FEES

This matter coming on upon motion and affidavit of J. Charles Dennis, United States Attorney for the Western District of Washington, and John F. Dore, Assistant United States Attorney for said District, and it appearing to the Court from said motion and affidavit and the records herein that the testimony of Joseph Yingling, 2600 Llewelyn Street, Baltimore, Maryland, is material and necessary at the trial of the above-entitled cause in the above-entitled Court on January 9, 1951, to be sub-

poenaed to appear January 8, 1951, at 10:00 a.m., and the Court being duly advised herein, it is hereby

Ordered that the Clerk of the United States District Court, Western District of Washington, Northern Division, issue subpoena directing the said witness hereinabove named to appear as a witness before the United States District Court for the Western District of Washington, Honorable John C. Bowen sitting, and to testify at the trial of the above-entitled cause, and called for that purpose; it is further

Ordered that the United States Marshal for the Western District of Washington be, and he hereby is, authorized to pay the necessary mileage and witness fees for the attendance of said witness hereinabove named at said trial.

Done in Open Court this 19th day of December, 1950.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

[Seal]: /s/ JOHN F. DORE,

Asst. United States Attorney.

[Endorsed]: Filed December 19, 1950.

[Title of District Court and Cause.]

### MEMORANDUM

The rule is, as asserted by plaintiff, that a party must plead the statute of limitations in order to avail himself of that defense. But where, as here, the action is one which does not exist at common law and has its origin in a statute which conditions the right of action to its commencement within a limited period of time, the time specified is a part of the substantive right and not a procedural requirement. Statutes of creation affect the right and not merely the remedy. "The liability and remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right." *The Harrisburg*, 119 U.S. 199. Such is the situation in the instant case. As a part of plaintiff's burden she must show that her cause is within the grant to sue. That burden is not carried unless she establishes that her action has been brought within the time limit. *Mathey v. Porter*, 158 Fed. F. 2d 478.

The state statute of limitations is not applicable. The federal statute prescribes a limitation of its own to the exclusion of the state statute. *State of Md. v. United States*, 165 F. 2d 869.

This action was brought within the time specified in the Act. Section 240(b), Title 28 U.S.C.A. The 1949 Amendment, in effect at the time this action was commenced, was intended to revive such otherwise expired tort claims against the United States accruing on or after January 1, 1945. 1949 U.S. Code Cong. Service, p. 603.

Laches is an affirmative defense and must be plead. If not, it is not available. Rule 8(c); *Bergeron v. Mansour*, 152 F. 2d 27. Defendant draws its support for this defense from the evidence and this rule is particularly applicable where laches is not apparent from the face of the complaint. *La Vecchia v. First Nat. Bank of Tampa*, 112 F. 2d 145.

It is unnecessary that the compensation moving to the carrier consist of cash or its equivalent to distinguish the occupant of an automobile as a passenger. It may consist of some other "substantial benefit, recompense or return making it worth while for him to furnish the ride." 60 C.J.S. 1011, citing *Finn v. Dritna* (Wash.) 194 Pac 2d 347; *Engle v. Interstate Transit Co.*, 9 Wash. 2d 590 and *Scholz v. Leuer*, 7 Wash. 2d 76. The soldier had been directed by his superior officer to transport plaintiff and her troupe from Seattle to Ft. Lewis for the purpose of putting on an entertainment for the soldiers there stationed. The United States performs a duty to its armed forces when it affords recreation. Recreation is a part of the soldier's duty and within the scope of employment. *Murphey v. United States*, 179 F. 2d 743. I am satisfied that the facts here establish that plaintiff was a passenger and that the case is within the rule that where the operator or owner of the automobile is compensated in a substantial and material sense as distinguished from a social benefit the occupant is a passenger.

The Federal Tort Claims Act authorizes suits

upon a derivative claim and the Anti-Assignment Statute, 31 U.S.C.A. 203, does not forbid suit by a subrogee, assignee insurance carrier. *National American Fire Ins. Co. v. United States*, 171 F. 2d 206. Though by statute the subrogee may maintain an action for subrogation in his own name, he generally may not maintain the action in his own name if he is entitled to but a part only of the proceeds of a single cause of action. *Doleman v. Levine*, 295 U.S. 221. Where the loss exceeds the payment made by the insurer, the action not only must be brought in the name of the insured, but the insurer is not a necessary or a proper party. 29 Am. Jur. 1014.

Judgment will be for plaintiff in the sum of \$250.00 special and \$7500.00 general damages. Counsel for plaintiff will prepare and lodge findings of fact in accordance with this memorandum and the conclusions expressed by the Court at the submission of the case.

Dated: January 25, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed January 25, 1951.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial, pursuant to regular assignment, before the Honorable Dal M. Lemmon on the 9th day of January, 1951, the plaintiff being present in person and by her attorneys, William A. Griffin and J. B. Pennington, and the defendant by its attorneys, Vaughn E. Evans, and both parties having announced ready for trial, the court proceeded to hear the evidence of witnesses and argument of counsel. And the court, being fully advised, on consideration does make the following:

### Findings of Fact

#### I.

Plaintiff's complaint was duly filed herein on the 21st day of April, 1950; summons issued; and, valid service thereof had upon the defendant. Defendant duly entered its appearance and filed its answer herein. The plaintiff is, and was at the time of filing her complaint and of the acts and things herein complained of, a resident of the City of Seattle, State of Washington.

#### II.

On February 20, 1946, at approximately eight o'clock p.m., plaintiff was a passenger on a certain United States Army Bus belonging to the defendant, and being used at the time to transport plain-

tiff and others as passengers therein from Seattle to Fort Lewis, Washington, for the purpose of providing recreation by way of entertainment for members of the United States Military Forces stationed at Fort Lewis, pursuant to request therefor by agents of the defendant, duly authorized and acting within the scope of their authority. The said bus was being driven by a soldier of the United States Army, pursuant to instructions from his superior officers, and he was acting within the scope of his authority and in the course of his employment as an employee of defendant. At a point near the intersection of South Tacoma Way and South Thirty-eighth Street in the City of Tacoma, Washington, while proceeding in a southerly direction, at the time mentioned, the said soldier drove the said bus negligently and at an excessive and negligent rate of speed and negligently applied the brakes on the said bus and negligently forced it violently and suddenly to stop. All of which negligent acts and omissions of the defendant by and through its agent, as aforesaid, was the proximate cause of and plaintiff was thrown suddenly and with great force from the seat occupied by her on said bus to the floor.

### III.

As a direct and proximate result of the negligence of the defendant, through its agent as aforesaid, the plaintiff suffered injuries and damage as follows: Severe sprain of the lower back and left ankle, bruises, contusions and severe nervous shock.

These injuries resulted in continuous and severe pain and suffering to this plaintiff, necessitated frequent medical treatment for a period of approximately one year, and intermittent treatment thereafter. They have further occasioned a marked and permanent weakening of the plaintiff's lower back and left ankle ligaments and muscles. All of which have and will continue to interfere with and reduce plaintiff's capacity for the pursuit of her work and in earning a living. That as a further proximate result of the negligence of the defendant, as aforesaid, plaintiff has necessarily sustained special damages for expenditures for medical treatment and medicines in the total sum of Two Hundred and Fifty Dollars (\$250.00), all of which amounts are reasonable.

#### IV.

The negligent acts and omissions of the defendant, as aforesaid, were contrary to the laws of the State of Washington and the ordinances of the City of Tacoma, and the same were done under circumstances where the defendant, if a private person, would have been liable to the plaintiff for the injuries and damages proximately resulting therefrom.

#### V.

That by reason of the negligence of the defendant, as aforesaid, and the injuries and damages proximately resulting therefrom, plaintiff has sustained general damages in the sum of Seven Thousand five hundred dollars (\$7500.00), and special

damages in the sum of Two hundred and fifty dollars (\$250.00), or in the total sum of Seven thousand seven hundred and fifty dollars (\$7750.00).

## VI.

That the said transportation of plaintiff from Seattle to Fort Lewis was as provided by defendant to plaintiff in consideration of and as a condition to the providing by plaintiff of the said entertainment for said military forces.

## VII.

That fifteen percentum (15%) of the total sum recovered by the plaintiff herein is a reasonable attorney's fee to be allowed to the attorneys for the plaintiff herein to be allowed out of but not in addition to plaintiff's recovery herein.

Done in Open Court this 2nd day of February, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

From the foregoing Findings of Fact the court makes the following:

## Conclusions of Law

### I.

Jurisdiction of this cause of action is conferred upon this court by the provisions of the Federal Tort Claims Act, Section 1346, et seq., Title 28, of the United States Code Annotated.

II.

Plaintiff, Esther Westfall, is entitled to judgment against the defendant, the United States of America, by way of general damages in the sum of Seven thousand five hundred dollars (\$7,500.00.), and by way of special damages in the sum of Two hundred and fifty dollars (\$250.00), or in the total sum of Seven thousand seven hundred and fifty dollars (\$7,750.00) and her costs herein.

Done in Open Court this 2nd day of February, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed February 2, 1951.

---

In the United States District Court for the Western District of Washington, Northern Division

No. 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This cause having come on for trial, pursuant to regular assignment, before the Honorable Dal M. Lemmon on the 9th day of January, 1951, the plaintiff being present in person and by her at-

torneys, William A. Griffin and J. B. Pennington, and the defendant by its attorney, Vaughn E. Evans, and both parties having announced ready for trial, the court proceeded to hear the evidence of witnesses and argument of counsel. And, the court having considered the evidence and record herein, been fully advised, and having heretofore made and entered its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that the plaintiff, Esther Westfall, do have and recover the amount of Seven thousand five hundred dollars (\$7,500.00), as general damages, and the sum of Two hundred and fifty dollars (\$250.00), as special damages, being in total sum of Seven thousand seven hundred and fifty dollars (\$7,750.00), and in addition thereto her costs herein, from the defendant, the United States of America, and that said counsel for plaintiff is awarded as attorneys' fees herein 15% of said \$7,750.00 to be paid out of but not in addition to said \$7,750.00.

Dated: February 2nd, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed and Entered February 2, 1951.

[Title of District Court and Cause.]

### AMENDMENT TO MEMORANDUM

The sentence beginning with the word "where" in line 12 of page 3 of the Memorandum filed herein and ending with the numerals "1014" in line 16 of the same page is deleted and there is substituted in place thereof the following:

Under rule 17(a) of the Federal Rules an insurer who has paid only a part of the loss is a "party in interest" though not an indispensable party. *United States v. Aetna Casualty & Surety Company*, 338 U.S. 366.

Dated: February 5, 1951.

/s/ DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed February 5, 1951.

---

[Title of District Court and Cause.]

### ORDER

Defendant has moved for a new trial, in support of which defendant advances the wholly tenuous argument that the court erred in announcing at the end of the trial certain conclusions without first inviting or permitting oral argument. The decision of the court upon the facts was not made until the findings of fact were signed and filed. The trial was completed on January 9th, 1951, and the find-

ings of fact were signed and lodged on February 2nd, 1951. If counsel for the defendant desired to more fully argue the facts they might have done so in the brief which was filed in the interval, or, if they entertained any misgivings as to whether it would have been permissible for them to do so, they should have at least requested permission, and, if they desired to orally argue the facts, they should have moved the court for leave to that end. Defendant's memorandum, filed on January 16th, 1951, does contain a comprehensive argument upon the questions of negligence, contributory negligence and proximate cause, an argument which is reiterated and re-emphasized in the brief in support of the pending motion. There is a complete absence of showing of abuse of the court's discretion.

Under the heading "Accident and surprise" counsel appear to contend that the defendant should be afforded a new trial because of surprise. In their language they state, "In all fairness the defendant should have an opportunity to make additional investigation and present additional evidence tending to prove that the driver from Baltimore was in fact the driver of the bus involved in this instance." But there is no showing that such evidence is available or can later be produced. No continuance was sought to meet the unexpected circumstance. The surprise here claimed does not therefore support the motion. *Ruedy v. Town of White Salmon, D. C., Wash.*, 35 F. Supp. 130, and cases cited therein.

The matter of damage has been heretofore fully

considered by the court as has also the claimed errors in law.

Defendant's motion for a new trial is denied.

Dated: March 19th, 1951.

/s/ DAL M. LEMMON,  
United States District Judge.

[Endorsed]: Filed March 22, 1951.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To Esther Westfall, plaintiff herein, and to William A. Griffin and Mabel B. Griffin and J. B. Pennington, her attorneys:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in the above court on the 25th day of January, 1951.

/s/ J. CHARLES DENNIS,  
United States Attorney.

Copy mailed.

[Endorsed]: Filed March 23, 1951.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME FOR  
DOCKETING RECORD ON APPEAL

Comes now the defendant, United States of America, and pursuant to Rule 73g, Federal Rules of Civil Procedure, moves the Court for an order extending the time to file with the United States Court of Appeals for the Ninth Circuit, the record on appeal in the above-entitled cause to and including Monday, June 11, 1951, which date is the 80th day from the date of filing the notice of appeal in the said cause.

This motion is based upon all files, records and proceedings herein and upon the affidavit of Merritt G. Dyer, attached hereto.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ VAUGHN E. EVANS,  
Assistant United States  
Attorney.

AFFIDAVIT

State of Washington,  
County of King—ss.

Merritt G. Dyer, being first duly sworn, upon oath deposes and says:

That he was the reporter who reported the above-entitled cause; that he will be unable to prepare the transcript of the record in the above-entitled cause

within the 40 days allowed for the reason that he is in the process of preparing two other transcripts which will run approximately 600 pages each, and further that the affiant has been a reporter in Judge Peirson M. Hall's court during the past week which has materially reduced the time which he would have available for the preparation of the transcript;

That this affiant believes and therefore states that he can complete said transcript by June 11, 1951, giving allowance for unforeseen emergencies which may arise in the future; that this affiant will diligently prepare such transcript as rapidly as possible.

/s/ MERRITT G. DYER.

Subscribed and sworn to before me this 13th day of April, 1951.

[Seal]:     /s/ J. CHARLES DENNIS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed April 13, 1951.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR  
DOCKETING RECORD ON APPEAL

On motion of the defendant, United States of America, the Court having considered the affidavit of Merritt G. Dyer in support of the motion, it is hereby

Ordered that the time for docketing the record on appeal in this cause in the United States Court of Appeals for the Ninth Circuit be and it is hereby extended to and including Monday, June 11, 1951.

Done in Open Court this 17th day of April, 1951.

/s/ JOHN C. BOWEN,

United States District Judge.

[Endorsed]: Filed April 17, 1951.

In the District Court of the United States for the  
Western District of Washington, Northern  
Division

No. 2529

ESTHER WESTFALL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Before: The Honorable Dal M. Lemmon,  
District Judge.

January 9, 1951—10:00 o'Clock A.M.

Appearances:

WILLIAM A. GRIFFIN, ESQ., and  
J. B. PENNINGTON, ESQ.,

Appeared on behalf of the Plaintiff;

VAUGHN E. EVANS, ESQ.,

Assistant United States Attorney,

Appeared on behalf of the Defendant.

Whereupon, the following proceedings were had  
and testimony taken, to-wit:

## ESTHER WESTFALL

the plaintiff herein, called as a witness on her own behalf, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Pennington:

\* \* \*

Q. You were a resident of Seattle at the time of the accident for which this action is brought?

A. Yes. [3\*]

\* \* \*

Q. Were you involved in an accident on February 20, 1946?      A. Yes, I was.

Q. What kind of an accident was this?

A. We were en route from Seattle to Fort Lewis to give a USO performance at a service club out at Fort Lewis.

Q. When this accident occurred?

A. Yes.

Q. What kind of a vehicle were you in or traveling on?      A. We were in an Army bus.

Q. Who was driving this bus?

A. A soldier in the Army.

Q. How did you know he was a soldier, Mrs. Westfall?      A. Well, he was in uniform.

Q. Was he sent to Seattle for the purpose of bringing this troupe to Fort Lewis?

A. Yes. [4]

\* \* \*

Q. Where were you going at the time you boarded this bus?

(Testimony of Esther Westfall.)

A. We were going to Fort Lewis to do a [5] show.

\* \* \*

Q. You left Seattle, then, en route to Fort Lewis?

A. Yes.

Q. Where, Mrs. Westfall, on this bus, were you seated during this trip to Fort Lewis?

A. I was sitting in a seat—there is a double seat in back of the driver's seat and I was sitting next to the wall of the bus and the windows.

Q. By a double seat, do you mean designed to accommodate two people?

A. To accommodate two, yes.

Q. Was there anybody seated on that seat with you?

A. No.

Q. Will you explain to the Court what if anything happened to you during this trip to Fort Lewis?

A. On the trip to Fort Lewis a light turned red and the driver slammed on his brakes, and I was thrown from the seat to the floor, and my full weight landed on my left leg and ankle; and in falling I was twisted so that my back was injured, too.

Q. Where did this occur, Mrs. Westfall?

A. It occurred at 38th and Highway 99 just as you make [6] your entrance to South Tacoma business district.

\* \* \*

Q. And you know that to be within the city limits of the City of Tacoma?

A. Yes, it is. [7]

\* \* \*

(Testimony of Esther Westfall.)

Q. When you approached the particular intersection of 38th and U. S. 99 where this accident occurred, can you estimate the speed at which this bus was traveling; that is, as he approached this light at that intersection?

A. I would judge he was driving between 50 and 60 miles practically all the way. [10]

\* \* \*

Q. Can you estimate for us his distance from the light at the time it changed as he approached the intersection?

A. Well, I would say he was about 50 feet from the light—maybe a little bit further back—when the light turned red. [12]

\* \* \*

Q. Mrs. Westfall, what was your general physical condition and health prior to the time of this accident?

A. Well, I have always been very healthy; hardly ever ill in my life.

Q. Have you had any trouble with your back or your leg?

A. Oh, I have had trouble with my back and leg ever since. It bothers me all of the time.

Q. Before the accident, I mean.

A. No, I haven't.

Q. And you say you have continued to suffer pain in your leg and back as a result of the injury sustained in this accident?

A. Yes, they bother me all the time.

(Testimony of Esther Westfall.)

Q. What effect, if any, Mrs. Westfall, have these injuries had with respect to your work or your ability to earn a living?

A. Well, my salaries haven't been as high as they were before and I have had to change the line of work so that I could adjust the time that I had to be on my feet to the way I felt.

Q. Were you working at the time of the accident?  
A. Yes, I was.

Q. May I ask if you continued to work thereafter?

A. Yes, I did. I was in bed three days after the accident. [15] I went back to work the fourth day; although I didn't feel like it, I had to.

Q. Did you go to a doctor after this accident, Mrs. Westfall?

A. I went to the doctor the next day.

Q. That was on February 21, 1946?

A. Yes, it was.

Q. And what doctor did you go to?

A. I went to Dr. Seering in the Medical Security.

Q. Will you explain to the Court what treatment you received by the doctor; did he examine you at that time?

A. Yes. Dr. Seering examined me and he X-rayed my back and my ankle. He couldn't find any break at all. I took physio-therapy treatments. I had a physio-therapy treatment before I went home that evening, and he wrapped my ankle and leg.

(Testimony of Esther Westfall.)

Q. Did you continue to wear support on your ankle and leg after that?

A. Yes. I wore it wrapped for months. I took physio-therapy treatments at first every other day on my back and leg, and then twice a week.

Q. For how long a period of time, Mrs. Westfall?

A. I believe it was June, 1947. [16]

\* \* \*

Q. When you stated, Mrs. Westfall, that the X-rays revealed no breaks, you had reference to bones? A. Bone breakage, yes.

Q. What did Dr. Seering advise you was the nature of the injuries?

A. Dr. Seering told me it was a very, very bad sprain. He said that it would have been a lot better if my ankle had been broken instead of sprained the way it was; that it would continue giving me trouble.

Q. What did he say with reference to your back?

A. Well, he said my back was badly [17] sprained.

\* \* \*

Q. What type of work were you doing at the time, Mrs. Westfall?

A. At that time I was doing substitute teaching in the Seattle schools.

Q. For how long did you continue to do that?

A. Well, I continued substituting the balance of that year. [18]

\* \* \*

(Testimony of Esther Westfall.)

Q. How long did you continue to work as substitute teacher?

A. I continued with the substitute teaching the balance of that year—until June.

Q. Did these injuries which you sustained interfere with your teaching or your work?

A. Well, of course, it made it difficult because my ankle and back bothered me all the time but I would go and teach whenever they called me because I just had to make every dime that I could.

Q. Did you ever have to ask for any special consideration due to the condition of your ankle and back?

A. Well, immediately following the accident I was at the Latona School. The principal was very lovely to me and told me to stay off my feet just as much as I possibly could, and I didn't have to take any duties.

Q. What did you do, Mrs. Westfall, after this period of substitute teaching; what was your next employment?

A. I went back to work at Boeing's. [19]

Q. What was the nature of your work there?

A. I was a key punch operator.

Q. Will you state whether or not and how your physical condition affected your work there?

A. Well, of course, anyone that works at Boeings—you have to do a lot of walking in order to get in and out of the plant. Of course, after I got in and to work I was seated practically all the time so that I wasn't on my feet. But in going in and going out, it was a considerable distance to

(Testimony of Esther Westfall.)

walk and my ankle and leg and back bothered me all of the time; and my ankle would just swell until I would think it would burst.

Q. How long did you continue to work there, Mrs. Westfall?

A. I worked there until about August of the following year.

Q. What was your usual wage during that period?

A. I made \$1.10 an hour, which amounted to around \$40 to \$45 a week.

Q. Will you state why you left this employment?

A. Well, I decided to take up selling because in that way if my leg and back bothered me too much I wouldn't have to go out; so I sold Stanley Home Products for about a year.

Q. Following your employment at Boeings——

A. Yes. [20]

Q. ——you sold Stanley Products for about one year. And what were your earnings during this period?

A. I judge about \$150 a month, approximately.

Q. Was it on a commission basis?

A. Yes, it was on a straight commission.

Q. What were your working hours or working schedule during this period of selling?

A. Well, you set your hours and time to suit yourself.

Q. Do you arrange your own appointments——

A. Yes.

(Testimony of Esther Westfall.)

Q. ———at whatever time you see fit?

A. Yes.

Q. And was it necessary for you to do a great deal of walking in connection with this?

A. No. If I could have done a great deal of walking I could have made much more money, but my ankle wouldn't permit me to get out and do much more walking.

Q. How would you get to and from your appointments or where were they made?

A. My appointments were made in the homes and I drove to and from them in my car.

Q. And you did this work for about one year until when?

A. Until November in 1948.

Q. What did you do after that, Mrs. Westfall?

A. I accepted a teaching position at Vashon Island. [21]

Q. What was the reason for accepting this position?

A. Well, I thought possibly that my ankle and back wouldn't interfere too much, and a teaching position is a steady monthly salary.

Q. Did it provide more income than your previous work of selling?

A. Yes, it did.

Q. About how much income did you derive from this teaching?

A. I think my monthly salary was \$212 a month without your tax deductions.

(Testimony of Esther Westfall.)

Q. Did your leg and back injuries interfere with you during this period?

A. They bothered me all of the time. Every night when I came home my ankle was very terribly swollen, and my back bothered me and made me cross and irritable.

Q. How long did you continue to teach during this period, Mrs. Westfall?

A. I taught from November until June of 1949.

Q. Did you teach any after that?

A. No.

Q. Have you ever taught any since?

A. I think I substituted a few days last year, and that is all.

Q. May I ask, Mrs. Westfall, if the reason why you have [22] not taught has any connection whatever with the condition of your ankle and back; did that enter into the reason for you discontinuing your teaching activities?

A. Well, yes, it did, because when you are teaching you have to be on your feet a considerable amount of time. You can't teach school and sit at your desk all of the time; it is impossible.

Q. Very well. Then what did you do after that, Mrs. Westfall?

A. I started selling Real Silk Hosiery.

Q. You went back to selling?

A. Yes, I did.

Q. For what reason?

A. Because you can set your time according to the way that you feel.

(Testimony of Esther Westfall.)

Q. After you stopped teaching in June, did you go immediately into selling?

A. No, I didn't. I went to school and got my B.A. degree. I went to school four weeks.

Q. What did you do after that?

A. Then I rested the rest of the summer.

Q. When did you go back into selling?

A. I started selling Real Silk in October of 1949. [23]

\* \* \*

Q. And you went back into selling Real Silk products, I believe you stated?

A. Yes, I did.

Q. In the fall of 1949? A. Yes. [24]

Q. And how long have you been working at that?

A. Well, since 1949. I am still working at it.

Q. You are still doing that kind of work, selling? A. Yes, I am.

Q. Your income is determined on a commission basis? A. Yes, it is.

Q. About what has your income averaged during the period of time since the fall of 1949?

A. Well, I would say, taking a balance of the whole thing, it would average, I would say, about \$150 a month; it might be a little more.

\* \* \*

Q. Do you think that your injuries in any way interfere with the extent to which you are able to earn income from your selling activities?

A. Yes, I do; because if I could be on my feet more, why, you could make many more sales. [25]

(Testimony of Esther Westfall.)

\* \* \*

Q. I would like for you to state, Mrs. Westfall, whether or not the condition of your leg and back is one of the reasons or the reason—or however you would characterize it—why you find it necessary to stay in the selling field instead of working at the kind of employment you were previously engaged in?

A. Well, when you are working on a steady day-to-day job you have to be on the job or take a chance on losing the position. With selling and working on a straight commission, it is up to you. If you are unable to go out, why, you don't [26] have to.

\* \* \*

Q. What expenses have you incurred, Mrs. Westfall, in connection with your examinations and treatments due to these injuries?

A. Well, I had my doctor bills and my treatments. I think Dr. Seering's bill was \$114 and something; and Dr. Lindahl's was \$20 for the X-ray and Dr. Sprecher's was \$15. And then, of course, during the course of the years, why, I spent around \$150 for medicines and salves and things like that, alcohol.

Q. Dr. Seering is connected with the Medical Security Clinic, is that not true?      A. Yes.

Q. Did you hold a policy in that clinic which provided for certain medical treatments and so on?

A. Yes, I did.

Q. What was the nature of that policy and how much consideration did you pay for it?

(Testimony of Esther Westfall.)

A. Well, your Medical Clinic costs you \$3 a month, and that included doctors and treatments and medicine and things. Of course, the other medicine, like rubbing alcohol and liniments and aspirin and Alka-Seltzer and different things like that and bandages, I bought at the drug stores. [31]

Q. How long had you held this policy?

A. Well, I took it when I first went to work at Boeing's in 1943.

Q. 1943. And you held it until when?

A. I think it was 1948.

Q. What did that policy cost you?

A. \$3 a month. [32]

\* \* \*

### Cross-Examination

By Mr. Evans:

\* \* \*

Q. The doctor bills were all paid by the insurance company? A. Not all of them, no.

Q. What doctor bills were paid by the insurance company?

A. The doctor bills under the Medical Security Clinic.

Q. What doctor bills were they?

A. That was Dr. Seering.

Q. Dr. Seering. Any other doctor bills?

A. No. It was those up there that were [33] paid.

\* \* \*

Q. (By Mr. Evans): So you didn't have to pay that money?

(Testimony of Esther Westfall.)

A. I paid my \$3 a month and have continued to do so for almost five years.

\* \* \*

Q. But they did pay all of Dr. Seering's bill?

A. That was paid out of my monthly [34] payment.

\* \* \*

Q. How much did you weigh at the time of the accident?

A. I weighed approximately 256 pounds.

Q. How long have you maintained weight at that?

A. I had weighed that since about 1940.

Q. How much do you weigh now?

A. I weigh about 175 pounds.

Q. How long has it been since you had any weight that approached 256 pounds?

A. I have been losing weight for about two years now. Both Dr. Seering and Dr. Lindahl told me that if I weren't so heavy possibly my ankle wouldn't bother me as much.

Q. Well, you were still weighing approximately 250 pounds in 1949 and the summer of 1949?

A. No, I didn't weigh quite that the summer of '49.

Q. Well, the summer of 1949 about how much did you weigh?

A. I believe I weighed 220 pounds. [35]

\* \* \*

Q. When you were in the seat directly—the first seat immediately behind the driver?

(Testimony of Esther Westfall.)

A. I was in the first seat immediately back of the driver. But the driver's seat was on this side and I was sitting over on this side. [36]

Q. In other words, as I understand, the driver was more towards the center line of the axis of the bus than you were towards the left-hand side of the bus?

A. Well, I was right over against the wall of the bus.

Q. Would that be the left-hand wall?

A. That would be the left-hand wall of the bus.

Q. Was there anyone else on the seat beside you there? A. No, I was sitting alone. [37]

\* \* \*

Q. Were you sitting in such a position where you could see the speedometer on the bus?

A. No, I couldn't see the speedometer on the bus. [38]

\* \* \*

Q. Did you limp for several days thereafter?

A. Well, I limped for months afterwards.

Q. Noticeably?

A. Well, sometimes it was more noticeable than others.

Q. A person couldn't be around you very long without noticing the limp, could they?

A. No. They would notice the limp and they would notice how my ankle was swelled.

Q. That is, most any casual observer who was around you would have been able to observe that?

A. I have had many people ask me——

Q. Just answer the question: Would any cas-

(Testimony of Esther Westfall.)

Q. The observer who was around you have noticed your disability in that regard?

A. Yes; most everybody did. [41]

Q. As I understand, you were working at the Latona School as a substitute teacher at the time of this accident? A. Yes.

Q. You had been working at Latona School all during that month of February up until the time of the accident, is that correct?

A. I think I went there the first of February.

Q. Do you recall what day of the week the 20th day of February came on?

A. It was on Wednesday.

Q. And the 21st then would have been Thursday? A. Yes.

Q. And the following day would have been the 22nd which was Washington's Birthday, is that correct? A. Yes, it was.

Q. Now, Washington's Birthday would have been a school holiday? A. It was.

Q. But the 21st would not have been a holiday?

A. No, it wasn't.

Q. Do I understand that you are advising the Court now that you did not go to work on the 21st day of February, 1946?

A. No, I never said I didn't go to work. I said I went [42] to work the next day after the accident and school was out at 2:00 o'clock that day and I went immediately to the doctor's office.

Q. Then you did go to work?

A. Yes, I did.

(Testimony of Esther Westfall.)

Q. And you did not immediately go home and go to bed for three days then, is that correct?

A. I said I went to work the following day—the following morning—because school was not in session all day. And I went to the doctor just as soon as school was dismissed. From the doctor's office I went home and went to bed and I was in bed for three days.

\* \* \*

Q. Monday you were back at work?

A. I went back to work on Monday, yes.

Q. And continued to teach for the rest of the week?

A. Yes, I did. However, it wasn't a pleasant job; when you are suffering and hobbling around and have your leg and ankle wrapped, why, it is not an easy thing to do.

Q. But you did teach?

A. I did, yes. I have worked many times when I really had no business working.

Q. And you continued to teach as a substitute teacher off [43] and on for the rest of that school year?

A. Yes, I did.

Q. Now, that would have been through the school year of 1946?

A. Yes.

Q. Then in July or August you were hired at Boeing's?

A. I was rehired—called back to Boeing's.

Q. And you worked there for approximately a year?

A. Yes, I did.

Q. And you earned \$1.10 an hour there?

A. Yes, I did.

(Testimony of Esther Westfall.)

Q. You worked how many hours a day?

A. Eight hours.

Q. That is a normal day's work, isn't it?

A. Yes, it is.

Q. During that period of time, you weighed approximately around 250 pounds?

A. Yes, I did.

Q. I didn't quite get it straight what employment you took at the conclusion of your employment at Boeing's.

A. I took up selling Stanley Home Products.

Q. What are Stanley Home Products?

A. They are cleaning chemicals.

Q. What do you mean by cleaning chemicals?

A. Floor wax, floor cleaner, silver cleaner, silver polish, [44] metal polish. And then they had a number of different brushes and things.

Q. How did you go about selling these items; did you have a store somewhere?

A. No. We booked parties at private homes and put on parties and demonstrated the chemicals and took orders.

Q. You would hire somebody to go along with you to put on these demonstrations?

A. I put on the demonstrations.

Q. You put on the demonstrations. Then you continued that until sometime in November of 1948, did I understand you to say? A. Yes, I did.

Q. At that time you went to work for Vashon?

A. Teaching school.

Q. As I understand, you were in all of this pain

(Testimony of Esther Westfall.)

at this time and considered yourself physically disabled?

A. Well, I was suffering all of the time.

Q. You didn't consider yourself physically disabled?

A. Well, I couldn't consider myself physically disabled because I had to make a living.

Q. Then it is my understanding that you do not now consider yourself physically disabled?

A. I don't consider myself a total invalid, [45] no.

\* \* \*

Q. Then you do consider that you are disabled?

A. Yes, I was disabled.

Q. Now, do you consider yourself disabled?

A. I don't know just in what sense you mean for me to call myself disabled.

Q. You have started this lawsuit to collect \$10,000 from the government and it is my understanding that you consider yourself disabled; now, are you or are you not disabled at this time?

A. I have been disabled to the extent that it has caused my income to be lower; and I suffer intense pain all of the time.

\* \* \*

Q. (By Mr. Evans): Mrs. Westfall, I don't believe I caught [46] your age on direct examination; how old are you now? A. I am 45.

The Court: That means you were 41 at the time of the accident? What is the date of your birthday?

The Witness: August 13th. I was born in 1905.

(Testimony of Esther Westfall.)

Q. (By Mr. Evans): Do I understand that this disability that you speak of has caused you to have a limp due to your swollen ankles and the soreness in your leg? A. A slight limp.

Q. If anybody was around you for any period of time, they would notice that? A. Yes.

Q. It is my understanding that your reason for discontinuing your teaching occupation was because of this injury?

A. Yes. I could have the time to—if I didn't feel like going out, I could stay at home.

Q. So, as I understand, you want the Court to believe that your reason for discontinuing the teaching profession is because of this injury, is that correct or not? A. Yes.

Q. Mrs. Westfall, isn't it a fact that in June of 1949 you applied to the Seattle Public Schools for a job as a permanent teacher?

A. Yes, I did put my application in. [47]

Q. Isn't it a fact that you renewed that application in March of 1950? A. Yes.

Q. You were not employed?

A. No, I wasn't.

Q. No offer of employment was made?

A. No.

Q. So that is in truth the fact why you discontinued your teaching profession, is that you couldn't be employed, isn't that correct?

A. I could have been employed but not in Seattle.

Q. Seattle is your home? A. Yes.

Q. Seattle is where you would have preferred to teach, isn't that correct? A. Yes, it was.

(Testimony of Esther Westfall.)

Q. In regard to your being employed selling Real Silk hosiery, what type of selling was that; were you in a store somewhere? A. No.

Q. What kind of selling did you have to do?

A. That is contacting private individuals.

Q. House to house canvassing?

A. Some of it is house to house canvassing.

Q. As a practical matter, that is about the only way [48] Real Silk hosiery salesmen make a living, is to make a house to house canvass, isn't that correct?

A. Yes; unless you have a clientele of people you can call on and make appointments and go and see.

Q. You had no such clientele, did you?

A. Well, I know a lot of people.

Q. But you made quite a bit of house to house canvassing?

A. Yes, I have made some house to house canvassing.

Q. And this was during 1949? A. Yes.

Q. This U S O show that you were putting on down there, were you paid for your services?

A. No, we were never paid.

Q. Why were you doing this work?

A. We were doing volunteer service entertaining the boys that were at the different camps.

Q. It was entirely voluntary, then?

A. Yes, it was.

Q. How about your performers, were they paid?

A. No, they weren't.

Q. Everybody was voluntary?

A. Everyone was voluntary.

(Testimony of Esther Westfall.)

Q. What was the general age bracket of the performers that you had in your show?

A. Well, Beverly was, I believe, 10 or 11 when she started [49] in. She was the youngest regular member of our troupe. At times I did take some smaller group of youngsters out to Fort Lawton. I never did take any of the younger ones to Fort Lewis.

Q. On this particular trip what was the general age bracket?

A. From 11 to 18 or 19. Of course, Mrs. Bruck was our pianist and she was older, and I myself was older.

Q. How many adults were along on this trip?

A. Well, Mrs. Bruck and Mrs. Holloway and myself; there were three of us adults on the trip. Of course, your bus driver.

\* \* \*

Q. Well, you in no sense considered yourself as the chaperon of these children, did you?

A. Well, I was in charge of the troupe. A person being in charge would in a certain respect be considered a chaperon.

Q. Were you performing any such function?

A. Yes, I was. [50]

\* \* \*

Q. Well, you would certainly never permit your daughters to go out on a trip such as this without some adult along as a chaperon?

A. No, I wouldn't.

(Testimony of Esther Westfall.)

Q. Nor would any of the other mothers?

A. No.

Q. From your observation did the members of your troupe, the entertainers, derive any enjoyment or pleasure out of this sort of an activity?

A. They enjoyed performing before an audience, yes.

Q. There was no compulsion on the part of anybody to go on any of these trips, was there?

A. No.

Q. If somebody didn't want to go, they didn't have to?

A. They didn't have to, no.

Q. You could have refused to go, yourself——

A. Yes, I could have.

Q. ——or any other member of your troupe. The parents of these children, I presume, more or less sanctioned the children going on these voluntary trips?

A. Yes, they did.

Q. On this type of entertainment and this work you were doing, did the Army and the Navy always furnish transportation? [51]

A. Yes, they always furnished transportation.

Q. Even when you might put on shows at Fort Lawton, they would always furnish transportation?

A. When we put on shows at Fort Lawton they furnished the transportation. When we put on shows downtown at the U S O Club, down on Second and Spring, we furnished our own transportation to get down there.

Q. Before or after the show was over was there

(Testimony of Esther Westfall.)

any sort of a social gathering where you and your troupe would meet the people at the Post or your audience?

A. Usually they would furnish some kind of refreshments—sandwiches and cokes or something like that.

Q. Sort of a small party, I gather?

A. Well, it wasn't exactly a party, no. Sometimes we took our sandwiches and got on the bus and left.

Q. But at the times when you would stay there would be a small gathering of some sort?

A. Well, it would just be with the hostess and our own group.

Q. As I understand this sudden stop which you say the bus made, there was no accident or collision or anything like that?

A. No, there wasn't except I was thrown off the seat. [52]

\* \* \*

(Photograph marked as Defendant's Exhibit A for identification.)

(Photograph marked as Defendant's Exhibit B for identification.)

(Photograph marked as Defendant's Exhibit C for identification.)

The Court: Counsel inquires as to what the pictures represent.

Mr. Evans: I intend to allow the witness to see whether or not she can identify them.

(Testimony of Esther Westfall.)

The Court: Before any questions are asked of the witness concerning them, opposing counsel may see the pictures.

Mr. Pennington: It is my understanding, your Honor, that they are being submitted to the witness [53] for the purpose of identification only and are not being offered in evidence.

The Court: They are being offered for the purpose of identification only at the present time. They have not been offered in evidence.

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibits A, B, and C, would you look at those and state generally whether or not you can identify what is depicted in those pictures?

A. Well, it looks like the inside of a bus, the left-hand side.

Q. From your memory of the particular bus you were riding on at the time, can you state whether or not those pictures in any way resemble the interior of the bus in which you were riding?

A. Well, none of these is a picture of the bus that I was on; definitely not.

Q. You are certain they are not a picture of the bus that you were riding in? A. Positively.

Q. Is there any similarity between the scene there and the bus that you were riding on?

A. Well, the only similarity is that there is this single seat here, and the double seat in back. [54]

Q. The single seat you are referring to is what we would normally consider as the driver's seat?

(Testimony of Esther Westfall.)

A. The driver's seat, yes.

Q. And the seat in back of the driver's seat, does that in any way resemble the seat upon which you were sitting at the time of this accident you speak of?

A. It would approximately be in the same position as the seat I was sitting on.

Q. How about the railing around behind the driver?

A. There was no railing on the bus that we were on.

Q. You are certain of that?

A. I am positive of it.

Q. What was your position on this seat; were you sitting with your back up against the back of the seat or were you sitting with your back towards the outside wall?

A. I was sitting with my back up against the back of the seat, next to the wall. [55]

\* \* \*

Q. Except for the rails behind the driver's seat as shown in those pictures, can you state whether or not the pictures there represent generally the portion of the bus in which you were sitting, a bus similar to the one shown in the picture?

\* \* \*

A. There is a similarity, yes.

Q. (By Mr. Evans): Now, is there any major difference in the bus in which you were riding from the interior of the bus shown in those pictures, other than the rails behind the driver?

(Testimony of Esther Westfall.)

A. This is a much newer bus.

Q. Except for the apparent newness, is there any material [56] difference so far as you can tell; I would like for you to look at them closely.

A. Well, as I remember, the seat of the bus wasn't quite as far back from the driver's seat. I think those old buses, the seats were up a little bit closer.

Q. The distance between the driver's seat and the front of the seat behind the driver was a little less on the bus you were in than the one shown in this picture?

A. Yes.

Q. That is your estimate of it now?

A. That is my estimate.

Q. But generally, not being specific as to distances, will you state whether or not now that gives a general picture of the interior of a bus that is similar to the one that you were in with the exception of the guard rails?

A. Yes, and this rail down here; there was no rail like that on the bus.

Q. The rail down there; can you give us some description of it so the reporter will understand what you mean?

A. The rail up and down.

Q. The horizontal bar?

A. The horizontal bar.

Q. The vertical bar?

A. There was no vertical or horizontal bar on the bus we [57] were on.

Mr. Evans: I offer Defendant's Exhibits A, B and C.

(Testimony of Esther Westfall.)

The Court: I will receive it as showing a similarity between the bus depicted in the pictures and the one in which she was riding at the time of the accident. It may be received.

(Defendant's Exhibit A received in evidence.)

(Defendant's Exhibit B received in evidence.)

(Defendant's Exhibit C received in evidence.) [58]

\* \* \*

#### Redirect Examination

By Mr. Pennington: [59]

\* \* \*

Q. Will you repeat or restate just what the situation on the bus, with reference to the side of the bus and the position of the driver and so on, was directly in front of you?

A. Well, the driver's seat was to the right of me and I was sitting next to the wall of the bus on the left-hand side. I was not sitting directly in back of him.

Q. Directly ahead of you what was there?

A. There was a vacant space there.

Q. Until what point—until the dash on the truck was reached?

A. The dashboard and the windshield.

Q. About how much space was there in there;

(Testimony of Esther Westfall.)

just give us an idea—from the left side of the bus to the seat occupied by the driver, about how much space was there?

A. Between the end of his seat and the wall of the bus?

Q. Yes; between the seat occupied by the driver and the left side of the bus.

A. Well, I judge it would be between a foot and a half or two feet.

Q. And directly ahead of you how much space was there? [60]

A. It is hard to estimate that, but I would say over two feet; a little over two feet. [61]

\* \* \*

### Recross-Examination

By Mr. Evans: [63]

\* \* \*

Q. If you had been sitting in that portion of the seat next to the aisle you would have been sitting directly behind the driver? A. Yes, I would.

Q. But you were sitting over——

A. I was sitting next to the wall of the bus on the left-hand side.

\* \* \*

Q. Now, there was a back on the driver's seat similar to the back of the seat that you were sitting on? A. Yes, there was.

Q. So far as you observed, it was a rather firm piece of furniture there on the bus that would have

(Testimony of Laura Troxell.)

The Witness: My seat.

The Court: That is what happened at this very time when Mrs. Westfall was thrown?

The Witness: Yes. We carried our costumes in suitcases; yes. [70]

\* \* \*

### Cross-Examination

By Mr. Evans:

Q. Mrs. Troxell, did you get paid anything for your services on these U S O trips?

A. No, I didn't.

Q. Did you gain any enjoyment or pleasure out of going on these trips? A. Yes, I did.

Q. Do you think the other entertainers did, too?

A. Well, I imagine they would or they wouldn't have done it because it was purely voluntary.

Q. It was purely voluntary on your part whether you went or whether you didn't? A. Yes.

Q. Why did you go?

A. Well, I think that anyone that enjoys performing in front of audience does enjoy that. And after all I mean it was part of the war effort. I did enjoy performing, so I went. [72]

\* \* \*

MRS. W. C. BRUCK

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

\* \* \*

Q. Mrs. Bruck, did you accompany the Westfall U S O Troupe on a trip from Seattle to Fort Lewis, Washington, on the evening of February 20, 1946?

A. Yes, I did.

\* \* \*

Q. You accompanied this trip to Fort Lewis for the purpose of providing entertainment for the military personnel stationed there? A. Yes.

\* \* \*

The Court: Get right down to the accident. Tell me what you know about it.

The Witness: Well, the bus driver drove quite fast and recklessly the whole way as if he were mad about something. He would jerk and start up quickly and go too fast all the way out. At this particular time he was approaching a red and green traffic signal. And instead of slowing up as one would normally do, he maintained his speed until he got right to the light and then slammed the brakes on, which threw us all forward in our seats. However, Mrs. Westfall, it threw her off of her seat onto the floor of the car.

The Court: You saw that, did you?

(Testimony of Mrs. W. C. Bruck.)

The Witness: No, I didn't see her fall. I saw her on the floor afterwards.

The Court: How far were you seated from her?

The Witness: I was about halfway back on the bus, I think, on the right-hand side.

The Court: You didn't see her fall but you did see her on the floor?

The Witness: On the floor, yes, sir. [79]

\* \* \*

### Cross-Examination

By Mr. Evans:

\* \* \*

Q. Your purpose in being along was that of being chaperon?

A. I don't quite understand your reference to chaperon. We were naturally chaperons, being parents, and adult members of the troupe.

Q. You wouldn't allow your daughter to have gone alone on this trip unless there were some chaperon along, would you? A. No. [81]

\* \* \*

Q. As I understand, an invitation was extended by somebody from the Army down at Fort Lewis for some entertainers to come down on this particular night?

A. That is what I understood.

Q. And your group responded to that invitation?

A. That is right. [82]

\* \* \*

MRS. E. T. HOLLOWAY

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

Q. Will you state your full name and address, please?

A. Mrs. E. T. Holloway; 2729 California Avenue.

Q. Mrs. Holloway, you have heard the testimony of the witnesses preceding you as to this trip of this U S O troupe from Seattle to Tacoma; will you explain in your own words to the Court what occurred that evening?

The Court: You were along on the trip, were you? [83]

The Witness: Yes, I was. As far as I remember, I was sitting about halfway back on the left-hand side. I do remember he was driving very fast. And this sudden stop at the stop light, we all were jolted forward and Mrs. Westfall was jolted out of her seat.

The Court: You saw that?

The Witness: No, I didn't; I saw her on the floor.

Q. (By Mr. Pennington): Do you recall where Mrs. Westfall was seated? A. Yes, I do.

Q. Where was she sitting?

A. On the first seat behind the driver.

(Testimony of Mrs. E. T. Holloway.)

Q. That is on the left side of the bus facing the front end of the bus?      A. That is right.

Q. Where was she on the floor?

A. I don't recall that. [84]

\* \* \*

Q. Have you been closely associated with Mrs. Westfall subsequent to this accident?

A. Well, some, yes.

Q. Have you had occasion to see her at different times, I mean?      A. Yes, that is true.

Q. Do you happen to know whether or not she has evidenced any continuous suffering or has this ankle or back injury continued to bother her since this accident?      A. Yes, I do know that. [85]

\* \* \*

Q. Have you ever had occasion to see her ankle when it was in a swollen condition?

A. Yes, I did.

Q. On more than one occasion?

A. Yes.

\* \* \*

#### Cross-Examination

By Mr. Evans: [86]

\* \* \*

Q. You were the third adult that was on the——

A. That is right.

Q. There were only three adults on the trip?

A. That is right.

Q. You had no part in the entertainment?

A. No.

(Testimony of Mrs. E. T. Holloway.)

Q. You were just along for the ride as part of the——

A. I had a daughter with the group.

Q. As far as you were concerned, it was just sort of a pleasure trip?

A. That is right. [87]

\* \* \*

BARBARA JEAN WESTFALL

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

\* \* \*

Q. Are you a daughter of Esther Westfall, the plaintiff in this case?      A. Yes, I am.

Q. You have heard from the testimony given here, Miss Westfall, of the accident in which your mother was involved while en route to Fort Lewis on February 20, 1946?      A. Yes.

Q. Were you a member of that troupe and did you accompany them on that evening?

A. Yes, I did. [96]

\* \* \*

Q. Did you see your mother thrown from the seat at the time the stop in question was made here?

A. Yes. First she was there and then she wasn't.

Q. What was the cause of her being thrown from the seat; will you explain in your own words just what happened?

(Testimony of Barbara Jean Westfall.)

A. Well, the driver was driving awfully fast and there was a red light and he just stopped suddenly and it just threw her on the floor.

Q. I didn't get the last. He stopped suddenly and your mother was thrown to the floor?

A. Yes, thrown on the floor. [97]

\* \* \*

Q. Miss Westfall, in approaching this intersection at which the accident occurred, how was the driver of this bus driving?

A. He was driving very fast.

Q. Could you estimate the speed?

A. Well, I would say about between fifty and sixty miles an hour. [98]

\* \* \*

Q. In approaching the light, will you attempt to tell us just how he made the stop?

A. Well, I don't know exactly. I don't know if he had seen the light or what but he just all of a sudden threw on his brakes abrupt.

Q. Did you happen to notice whether there was any other traffic, especially cross traffic?

A. I didn't see any other traffic.

\* \* \*

Q. Have you continued to reside at home with your mother during the years since this accident?

A. Yes, I have.

Q. Did she make any complaints or was there any evidence of injury to her ankle or back subsequent to the accident?

A. Yes. Yes, there has been. It has been very

(Testimony of Barbara Jean Westfall.)

painful. [99] Her leg is always swelling. Her left leg swells.

Q. Will you speak just a little bit louder, please?

A. Her left leg is always swelling. When she has been walking or standing on it, it swells, and her back bothers her a lot.

Q. During this period have you had occasion to assist her or help her in any way or treat her?

A. Well, yes; I helped rub her leg, rub her back, and wrapped a bandage on her leg when she used to wear that rubber bandage on her leg.

Q. Is it a fairly continuous thing?

A. Sometimes it bothers her worse than other times when she has to walk a lot or stand a lot.

Q. Has this condition continued down to the present time?      A. Yes, it has.

Q. She still continues to complain of her ankle and her back?      A. Yes.

Q. Has she managed to do her usual household chores and work during this period?

A. No. Eunice and I do all of the household work and cook.

Q. Have you since the accident?      A. Yes.

Q. Has that been made necessary because of this accident? [100]      A. Yes.

Q. Do you know whether her injuries since this accident have interfered with her work in any way or not?

A. I know some days she can't go out to work because she just doesn't feel well and then she stays at home.

(Testimony of Barbara Jean Westfall.)

Q. Can you recall any specific instances when you have assisted in treating your mother such as massaging or using ice packs or anything of that nature? [101]

\* \* \*

### A. H. SEERING

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Pennington:

\* \* \*

Q. Are you a practicing physician, Doctor?

A. Yes, I am.

Q. Where do you maintain your offices?

A. I am associated with a large clinic in the Securities Building in this city.

Q. How long have you been practicing medicine?

A. I graduated from the University of Minnesota Medical School in 1932, following which I interned in Providence Hospital in this city, and following which I served a surgical and orthopedic residency in the County Hospital in this city. For several years I was associated with a large industrial hospital in Eastern Washington. And for the last twelve and a half years I have been associated with a clinic where I now am, doing orthopedic and traumatic surgery.

(Testimony of A. H. Seering.)

Q. You have specialized during the last twelve years?

A. I have done that work exclusively for the last fifteen [106] years.

Q. Did you attend the plaintiff, Mrs. Esther Westfall, in this accident?      A. Yes.

\* \* \*

Q. Will you tell the Court when you first examined Mrs. Westfall and what you found upon that examination?

A. She was first seen by me on the 21st of February, 1946, with the complaint of an injury having been sustained on, I think, the previous evening as a result of an accident sustained while riding as a passenger in an Army bus, I believe she stated.

The complaint at the time was an injury of the left ankle and a painful spine. I examined her on that date and found that there was a massive and extreme swelling of the left ankle, and marked discoloration of the ankle. There was considerable pain and tenderness in the region of the lower dorsal spine, particularly the 12th dorsal vertebra, and there was marked limitation of motion of the entire spine because of pain and spasm. X-ray examination done on that date and the several dates following this first [107] visit did not reveal any fracture or any bone injury in the ankle or the spine. She did, however, receive a number of physiotherapy treatments to the ankle and the spine over a period

(Testimony of A. H. Seering.)

consuming approximately a year and a half from the date of my first examination.

\* \* \*

Q. At the time you last examined her, which was in the spring of 1947, Doctor, was there any residual disability remaining from these injuries?

A. Yes; there was still marked point tenderness or very definite point tenderness over the spinus process or the bony prominence over the 12th dorsal or 13th dorsal vertebra. There was a fluctuant mass in the under-surface of the left ankle. There was in my opinion, at that time or immediately before I last saw her, it was my opinion that it was very possibly a joint hernia present there as the result of torn [108] ligaments, and a herniation of the joint tissues between the skin. [110]

\* \* \*

Q. I believe you stated your final diagnosis in this case was severe sprain?

A. Yes. We were unable to establish any bone injury in either the spine or the ankle joint and actually that is all that an x-ray of an extremity will show us with any certainty.

The only remaining injury that we could make any conclusion on was a severe soft tissue injury.

Q. From the nature of the sprain as you found it to exist, can you state with any reasonable degree of certainty whether there is likely to be a continuing disability?

A. The time I saw her last, it was approximately

(Testimony of A. H. Seering.)

16 months from the date of her injury, and she was at that time [111] extremely disabled. It is very difficult to state these things in percentages—by a percentage evaluation, because that entails taking into consideration the patient's employment, whether it is sedentary, whether it necessitates a lot of ambulation. She was extremely disabled for any work that would require a lot of walking and a lot of physical activity. If her work were sedentary, then perhaps she would be disabled to a lesser degree. But in anything that involved motion in her daily livelihood she was at a constant handicap because of it.

Q. Were these injuries such that they ordinarily were accompanied by pain; I believe you stated they were, did you not?

A. That is right. And up to the last time I saw her, she was still receiving treatment at intervals—at frequent intervals—and had still almost as great, well, certainly not as great as when I saw her the day after the injury but she had a severe degree of limitation of motion to the spine and severe swelling of the ankle and considerable pain in walking. I haven't seen her since that date and am unable to draw any conclusions as to her present condition.

Q. Do you recall the plaintiff's age at the time you [112] examined her or last examined her, either?

A. Her age at the time of her injury was 41 years, as it appears in my notes.

Q. I don't think any mention has been made of

(Testimony of A. H. Seering.)

life expectancy but perchance could you state what her life expectancy would be for that age?

A. For a woman, according to insurance actuarial figures, it would be approximately 26 years.

Q. Doctor, did you render a bill for your services in this case?

A. There is a bill here, yes. It is itemized. This is a copy of a bill that was undoubtedly rendered.

Q. Would you just state the total amount, Doctor?

A. The total amount is \$114.25. That is itemized for the services rendered between the dates of February 21, 1946 and June 11, 1947. Would you like this?

Q. I don't believe we need that in evidence; but I would like to ask you, Doctor: This covers the series of treatments which you administered?

A. Yes; that is all itemized.

Q. Mrs. Westfall stated in her testimony, Doctor, that she held a policy with the Medical Security Clinic. Is that the clinic with which you are connected?

A. It was then so named; it is now incorporated as the Group Health Cooperative of Puget Sound.

Q. And the consideration which went to pay for the services received by her at your clinic, would it have been covered under the terms of that policy?

A. That is correct, although there is a subrogation clause which entitles us to seek recourse against any other liable party if such there be, under the terms of the contract. [114]

(Testimony of A. H. Seering.)

Cross-Examination

By Mr. Evans:

Q. Doctor, do I understand that your bill of \$114.25 was paid by the insurance company?

A. No; there really isn't any insurance company involved in it.

Q. As I understand, there was some sort of a policy where you had a right of subrogation here?

A. It is a contract, yes, between patients,—we have a contractual agreement with the patients to render medical services. In the event of the liability of any third party we have a clause, whether legal or not, which entitles us to take recourse against that third party.

Q. So actually what Mrs. Westfall was out was \$3 a month, is that right?

A. That is probably true, yes.

Q. She didn't actually pay the \$114.25?

A. I really don't know.

Q. Well, you don't know whether you have been paid or not?

A. No, I don't. That would be handled by the accounting office, anyway.

Q. Well, she was a patient up there under this medical policy, was she not?

A. That is right. [115]

Q. And under the normal course of events the \$3.00 a month pays for her medical services?

A. That is right.

(Testimony of A. H. Seering.)

Q. And the \$114.25 would have not have been paid by her?      A. Probably not.

Q. If she had considered she needed further treatment, could she have still gone to your office and obtained such treatment as you might prescribe for this \$3.00 a month?

A. Well, I really don't know. I don't have a copy of the contract which covered her and provided her with medical services. There were then, I am sure, and I know there are today, limitations placed on the duration of services available.

Q. Do you know whether or not she had used her rights under this policy to the fullest extent so far as your services were concerned?

A. She had in all probability exceeded it by that time, I believe. It is quite generally too true, now, with the very few contracts that we have for medical services. It is true that the time limit for the treatment of any condition is six months, by which token she would have exceeded it by eight months.

\* \* \*

Q. By any chance do you have a letter which you wrote to the law firm of Griffin & Griffin on June 21, 1948?      A. I have a copy of that, yes.

Q. May I see it, please?

A. The June 21, 1948?

Q. Yes.

A. (Witness hands sheet of paper to Mr. Evans.)

Mr. Evans: I would like to have this marked for identification, please.

(Testimony of A. H. Seering.)

(Carbon copy of letter from Dr. Seering to Griffin & Griffin, marked as Defendant's Exhibit D for identification.)

Q. (By Mr. Evans): This Exhibit D which you have just given me is a true copy of the letter which you transmitted to opposing counsel?

A. I presume it is. It is not certified but I presume that can be verified.

Mr. Pennington: I have the original here.

Mr. Evans: May I have this one marked [117] for identification?

The Court: Substitute it for the other.

The Clerk: This is the same letter?

Mr. Evans: Yes. Substitute it for the other.

(Original copy of letter from Dr. Seering to Griffin & Griffin marked as Defendant's Exhibit D for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit D, Doctor, can you identify that letter as being one which you wrote?

A. That is right. That bears my signature.

Mr. Evans: I will offer Exhibit D.

Mr. Pennington: No objection.

(Defendant's Exhibit D received in evidence.)

(Testimony of A. H. Seering.)

DEFENDANT'S EXHIBIT D

Medical Security Clinic  
Securities Building—Third and Stewart  
Seattle 1, Washington  
ELiot 6988

June 21, 1948

Griffin & Griffin,  
Palomar Building,  
Third & University,  
Seattle 1, Washington.

Re: Esther Westfall.

Dear Sirs:

The above named client of yours was seen by me on February 21, 1946, relative to an ankle (left) and back injury sustained on February 20, 1946. She first complained of the ankle and X-ray examination was done and found negative for bone injury.

A few days later she returned complaining of her back. Examination revealed tenderness over the left 12th rib. X-ray was negative for bone injury.

She received numerous physical therapy treatments to her ankle and back from that time until August 8, 1946. When last seen on June 11, 1947, she still complained of persistent backache. Final diagnosis was severe sprain and contusion of lumbar spine and lower dorsal spine. Severe sprain left ankle.

(Testimony of A. H. Seering.)

There was appreciable residual disability remaining when she was last seen.

Very truly yours,

MEDICAL SECURITY CLINIC,

/s/ A. H. SEERING, M.D.

AHS/pm

Encl.

Admitted January 9, 1951.

---

Mr. Evans: According to this letter it states here, "The above-named client" referring to Esther Westfall—"was seen by me on February 21, 1946, relative to an ankle and back injury sustained on February 20, 1946. She first complained of the ankle. An X-ray examination was done and found negative for bone injury."

Then in the next paragraph you state: "A few days later she returned complaining of her back."

Do I take it to understand from that that [118] on her first visit she made no particular complaint about her back?

A. Well, the ankle was obviously the most acutely painful at the time she was seen on the first date, the 21st of February.

The Court: The question is did she complain about her back the first time you saw her?

The Witness: Apparently not, or at least it wasn't called to my attention.

(Testimony of A. H. Seering.)

Q. (By Mr. Evans): A few days later when she returned, however, she was complaining about her back? A. That is right.

\* \* \*

Q. Isn't it a fact that individuals and particularly women who weigh in excess of 250 pounds frequently [119] have trouble with their ankles for no particular cause at all, merely because of excessive weight? A. Oh, it occurs, yes.

Q. And because of having to carry that excessive weight isn't it likewise true that they frequently have trouble with their back?

A. That is occasionally true. [120]

\* \* \*

The Court: Doctor, in your treatment were there any objective findings relating to the back injury?

The Witness: The last complaint she had was the pain in the back, and she still had the point tenderness as we call it over the spinous process of the 12th dorsal vertebra, and that was in June, 1947. I am unable to say anything about her symptoms.

\* \* \*

The Court: You did find muscle spasm, did you?

The Witness: That was apparent throughout her convalescence and was one of her most persistent complaints.

The Court: And that validated her complaints?

The Witness: It would. Of course, we have got to decide between a patient who has pure subjec-

(Testimony of A. H. Seering.)

tive complaint, on the basis of a purely organic condition. The complaint of pain, also, is a subjective complaint. When it is so consistently the same and in the same place, it is rather difficult for a patient to see her own back. And when it is consistently located at the same point of tenderness it is not very likely that the symptom is being simulated.

The Court: She couldn't simulate the muscle spasm there, could she?

The Witness: Not very likely. Nor could [123] she constantly simulate a point of tenderness by simply contact on pressure. And it was always persistently over the 12th dorsal vertebra.

The Court: Anything further from the doctor?

Q. (By Mr. Pennington): And your final diagnosis with reference to her back was severe sprain?

A. Severe sprain, and likewise of the ankle except for the question of a possibility of a joint hernia.

\* \* \*

WALLACE W. LINDAHL

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pennington:

Q. Will you state your name, please?

A. Wallace W. Lindahl.

(Testimony of Wallace W. Lindahl.)

Q. You are a practicing physician?

A. I am. [124]

Q. Where do you maintain your office, Doctor?

A. 702 Summit Avenue.

Q. How long have you been practicing medicine, Doctor?

A. I have been practicing in Seattle since the 1st of July, 1946.

Q. Of what medical college are you a graduate?

A. Northwestern University.

Q. Doctor, have you specialized in any particular branch of medicine or surgery?

A. I am a specialist in the field of internal medicine.

Q. Have you examined Mrs. Esther Westfall who is the plaintiff in this action, Doctor?

A. I have, yes.

Q. When did you examine Mrs. Westfall?

A. March 8, 1949.

\* \* \*

Q. I think the findings of your examination.

A. I see. I found that the positive physical findings were the extreme weight, 253 pounds, and a pitting edema of both lower extremities, and a swelling of the left ankle which was greater than a swelling of the [125] right ankle. Both legs were somewhat swollen throughout. There was point tenderness just anterior to the exterior malleolus of the left ankle on pressure. I believe those were the essential positive findings.

(Testimony of Wallace W. Lindahl.)

Q. Did you make any findings with reference to Mrs. Westfall's back?

A. I noted at the time that I saw her that her back appeared to be normal.

Q. There was no tenderness to palpation during your examination of her?

A. I did not find any, no.

Q. And the left ankle?

A. It did have point tenderness just anterior to the external malleolus and it was swollen. It measured as I recall, in circumference 12 inches. The ankle on the right side was measured and measured 11 1/2 inches. [126]

\* \* \*

The Court: Did she complain of any tenderness [127] in her right ankle?

The Witness: No, she didn't.

The Court: But you found a condition in the right ankle somewhat similar to the one in the left?

The Witness: No. The only condition found in the left ankle was that it was more swollen than the right.

The Court: Well, you found the swelling in both ankles, didn't you?

The Witness: Yes, there was some swelling in the legs and both sides all of the way up.

The Court: Have you any opinion now as to the cause of the condition you found in those ankles?

The Witness: It is my feeling that a portion of the swelling in both legs was due to the fact that

(Testimony of Wallace W. Lindahl.)

this woman weighed 253 pounds and that a pitting edema, that is, a pitting swelling of the legs on both sides but it was greater on the left than on the right; and it was my assumption that the left being greater than the right, and there being point tenderness there, that there was not on the right side,—that is, point tenderness on the left side that there was not on the right side, it was my assumption that that was due to the injury that was incurred.

\* \* \*

The Court: I just wonder if you could give me some idea of how much pain and discomfort, if any she would have had had she not had the injury.

The Witness: I don't believe that we can feel she would have had any pain and discomfort in the left ankle had she not had the injury. [129]

\* \* \*

The Court: Is it your opinion that the pain she complained of was caused through the injury?

The Witness: It is my impression or it was my impression at the time that I examined her that the pain and the greater swelling on the left side was the result, first of all, of the injury; and secondly, an aggravation of that by having to carry excessive weight, yes.

Q. (By Mr. Pennington): Did you render a bill for your services? A. Yes, I did.

Q. Can you state the amount at this late date?

A. The amount was \$15.

Q. Were there any x-rays made?

(Testimony of Wallace W. Lindahl.)

A. Yes, there were, but that did not include the cost of the x-rays. The x-rays were made by a specialist in radiology. [130]

\* \* \*

Cross-Examination

By Mr. Evans:

\* \* \*

Q. It is my understanding you examined her on March 8, 1949?

A. My records indicate I believe that I did examine her on [131] that date.

Q. At whose request did you make that examination?

A. She was referred to me by Mr. Griffin.

Q. Did you render a report to Mr. Griffin?

A. I believe I did, yes.

Q. Did you prescribe any treatment for her at this time?

A. Yes, I did.

\* \* \*

Q. In other words, your examination at this time was for the purpose of being able to testify here in this lawsuit, is that right?

A. I presume it is.

Mr. Evans: I move that all of this doctor's testimony with regard to costs be stricken. I don't believe that is a part of the recoverable costs.

The Court: The motion is denied. [132]

\* \* \*

## E. E. SPRECHER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Pennington:

Q. Are you a practicing physician, Dr. Sprecher?

A. I am.

Q. Where do you maintain your office?

A. In the Medical Dental Building.

Q. How long have you been practicing medicine, Doctor?      A. Ten years.

Q. Of what medical college are you a graduate?

A. The College of Medical Evangelists.

Q. Have you specialized in any particular form of medicine or surgery, Doctor?

A. I specialized in orthopedics.

Q. How long have you practiced this specialty?

A. Two years.

Q. Are you connected with any institutions here in Seattle at present, Doctor?

A. Yes, I am.

Q. In what capacity?

A. I am a clinical instructor in orthopedics at the [133] University of Washington. I am on the teaching staff at the Orthopedic Hospital.

Q. Have you examined Mrs. Westfall, the plaintiff in this action?      A. I have.

(Testimony of E. E. Sprecher.)

Q. When did you examine Mrs. Westfall, Doctor?  
A. The 11th of December, 1950.

Q. Would you state to the Court what your findings were upon that examination?

A. I found her to be complaining of pain in her back and in her left ankle. Examination of her back revealed a very minimal amount of muscle spasm, a minimal amount of limitation in motion, and considerable tenderness to palpation in the upper lumbar and lower dorsal muscles, particularly about the 12th thoracic. She also had pain on palpation about the left ankle, particularly on the outer side. At the time that I [134] saw her, she had no swelling in either ankle. She gave a history of limited use of her ankle, weakness. She said that it gave out easily; that she was able to stand on her foot a limited amount of time and do a limited amount of walking; excessive activity caused considerable pain in her ankle.

Q. From the history of this patient and from the symptoms if any, as found by you or as just outlined by you, Doctor, what is your diagnosis?

A. I think that she had a sprain of her back and a sprain of her left ankle.

Q. Are these injuries of such a nature that they ordinarily are accompanied by pain and suffering from pain?

A. It was my opinion that her injuries were considerably more severe than the average sprains are. The disability following the injuries was much more marked than usual and much more prolonged. It was my opinion that both the injury in her back

(Testimony of E. E. Sprecher.)

and the injury in her ankle, at the time that she was injured, were severe.

Q. From that, Doctor, could you state with any reasonable certainty whether the physical injuries found in this plaintiff were such as might be of a permanent nature or have a permanent effect; and if so, what would that effect be? [135]

A. It was my opinion that the condition, when I examined her, was a permanent one. It would affect her in limiting her working capacity, limiting the time that she could stand, and limiting the amount of walking she could do, and limiting any other work that she could do.

Q. Unless her activities were kept within these restricted limits, what would be the result?

A. She probably would have pain in her ankle and her back to the point that she wouldn't be able to do anything.

\* \* \*

The Court: Does surgery offer any prospect?

The Witness: Yes, I think it is probable that she could be improved by surgery. It was my opinion, though, that if she limited her activities she probably would get along about as well without it. There is some question in my mind how much she would be improved by surgery either on her back or on her ankle.

The Court: Your advice, then, to her is not to have surgery but just to limit her activity?

The Witness: That was my advice.

The Court: And it still is?

(Testimony of E. E. Sprecher.)

The Witness: It still is. [136]

Q. (By Mr. Pennington): Did you render a bill for services in examining this plaintiff and if so in what amount?

A. It may sound funny but I don't know.

Q. What would it be?

A. My usual fee for such services is \$15.

Q. And you consider that such fee is reasonable?

A. Yes.

### Cross-Examination

By Mr. Evans:

Q. Doctor, at whose request did you make this examination?

A. I made this examination at the request of her attorney.

Q. Did you render a report to her attorney?

A. Yes, I did.

Q. And you made this examination for the purpose of being able to testify here in this trial as to your findings?

A. Not necessarily. Her attorney consulted me on the telephone and asked me to examine her and asked me to recommend treatment for her if there was some treatment that I thought would benefit her.

Q. Has any treatment been recommended by you?

A. The only recommendation I made was that she limit her activity.

Q. What do you mean by limiting activity? [137]

(Testimony of E. E. Sprecher.)

A. Avoid motion of her back as much as possible; to do a minimal amount of stooping and bending and twisting,—all activities which would cause motion in her back; to do a minimal amount of walking or a minimal amount of standing. It was my feeling that excessive activity along these lines would disable her to the point where she would not be able to be up and about at all.

Q. Did you measure her ankles?

A. No, sir.

Q. You didn't take any measurement of them at all?

A. No, sir.

\* \* \*

Mr. Pennington: That concludes the Plaintiff's case, your Honor.

(Plaintiff rests.)

Mr. Evans: I would like to move to challenge the sufficiency of the evidence, your Honor.

The Court: I think it is sufficient. [138]

\* \* \*

HAROLD R. BARTON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

\* \* \*

(Testimony of Harold R. Barton.)

Q. Where are you employed, Mr. Barton?

A. The Vashon Schools at Vashon Island. [141]

\* \* \*

Q. How long have you been employed in your present capacity?

A. This is my third year as superintendent.

Q. Will you state whether the plaintiff here, Esther Westfall, has ever worked in any of the schools under your supervision?

A. Yes, she did. She started on November 1, 1948, and taught through the balance of the year.

Q. On any occasion during that period of time, did you have occasion to see her and observe her?

A. Yes, I did.

Q. Did it ever come to your attention or did you ever observe anything that would indicate to you that she had any physical disability?

A. I saw nothing to that effect, no, sir.

Q. Had she had a limp of any degree at all, do you think you might or might not have noticed it?

A. I think I would have.

Q. Had she had any other type of physical disability, will you state whether or not you think you would have noticed it? [142]

A. I believe I would have.

Q. About how frequently would you see the plaintiff during this period from November, '48 to June of '49?

A. I attempt to get into each one of the schools approximately once a week.

(Testimony of Harold R. Barton.)

Q. Did you see her on each one of those occasions?

A. I expect on most of the occasions, anyhow.

Q. Will you state whether or not you recall submitting a report to the Seattle School District on Esther Westfall's qualifications sometime in 1949?

Mr. Pennington: If your Honor please, I object to this type of evidence being brought out. I can't see where it has any bearing.

The Court: Sustained.

Mr. Evans: My question is preliminary, your Honor. I believe it would be competent for him to testify what he put in that report in regard to her physical ability and that was my purpose.

The Court: Objection sustained.

Mr. Evans: You may cross-examine.

### Cross-Examination

By Mr. Pennington: [143]

\* \* \*

Q. And you stated that you usually got to the different schools on Vashon Island on an average of about once a week? A. That is right.

\* \* \*

Q. In the ordinary course of events would there ordinarily have been any reason for you to have had occasion to notice Mrs. Westfall's ankles to notice whether they were swollen or anything of that sort?

A. I wasn't in the habit of doing that but I

(Testimony of Harold R. Barton.)

would have noticed something on the playfield or in the classroom.

Q. You made the statements you would have been in a position to have observed any disability had she had one?           A. I believe so. [144]

\* \* \*

### KATHERINE DEASY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Evans:

\* \* \*

Q. Where are you employed, Miss Deasy?

A. At Latona School as principal.

Q. How long have you been so employed?

A. Seven years.

Q. Do you recall whether or not Esther Westfall has ever worked at your school? [145]

A. Yes; from January 28th to March 1st.

Q. What year?           A. 1946.

Q. How many teachers were employed at the school during that period?

A. Fourteen at the time.

Q. Will you state whether or not you had an opportunity to daily observe the teachers in your school?           A. Every day.

Q. Will you state whether or not at any time during that period of time you observed any limp

(Testimony of Katherine Deasy.)

or other outward manifestation of any injury in Mrs. Westfall?

A. That is a very vague memory in my mind. I would not like to swear to that.

Q. Do you recall any such?

A. I don't recall, myself.

Q. If she had been injured and had any limp, will you state whether or not you now believe that would have come to your attention?

A. I think so.

Q. And you believe that you would now remember it, if it had occurred? A. I think so.

Q. Do you have any recollection of any such?

A. From my own viewpoint, no. [146]

\* \* \*

### Cross-Examination

By Mr. Pennington:

Q. Miss Deasy, I believe you stated that you have no conscious recollection of having seen her limp during this period of employment?

A. Yes, sir.

Q. Do you mean to say by that that if she had had an injured ankle that you think you would recall it? A. I think I would.

Q. Do you think if she had limped or otherwise?

A. Will you state your question again, please?

Q. You stated that you have no conscious recollection of seeing Mrs. Westfall limp?

A. Yes, sir.

\* \* \*

Q. I see. But you can't state positively she

(Testimony of Katherine Deasy.)

didn't have [147] a swollen or an injured ankle?

A. No, I can't state positively. [148]

\* \* \*

Mr. Evans: I would like to call Mrs. Esther Westfall as an adverse witness.

The Court: You may do so.

### ESTHER WESTFALL

recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Evans:

(Document, Teacher's Application, marked as Defendant's Exhibit E for identification.)

Q. Mrs. Westfall, handing you what has been marked for identification as Defendant's Exhibit E, which purports to be a document where there is some handwriting on it, will you please examine it and tell me whether or not that is in your handwriting? A. Yes, it is.

Q. And will you look at the reverse side of it; is that [149] in your handwriting?

A. Yes, it is.

Q. Isn't that your application for a job as a permanent instructor with the Seattle Public Schools? A. Yes, it is.

Q. And the information furnished thereon is the information which you furnished in connection with that application? A. Yes.

(Testimony of Esther Westfall.)

Q. And you submitted that application sometime in June of '49? A. Yes.

Mr. Evans: I would like to offer Exhibit E.

Mr. Pennington: No objection.

The Court: It will be received.

(Defendant's Exhibit E received in evidence.)

Mr. Evans: In that connection I have a photostatic copy of that application which I would like to substitute for Exhibit E, the reason being that the Seattle Public Schools would like to have the record for their files.

The Court: I am sure counsel would have no objection if it is a photostatic copy.

Mr. Pennington: No objection. [150]

The Court: Yes, that may be substituted for the original. [151]

\* \* \*

### FLORENCE WAYMAN

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Evans:

\* \* \*

Q. Where are you employed, Mrs. Wayman?

A. Seattle School District.

Q. How long have you been employed there?

A. Sixteen years.

(Testimony of Florence Wayman.)

Q. In what capacity?

A. Pay roll clerk.

Q. Will you state whether or not in that capacity you are the custodian of the pay roll records?

A. Yes, I am.

Q. Will you state whether or not those records would reveal the number of days and the dates that Mrs. Westfall worked for the Seattle schools?

A. They would.

Q. Do you have those records with you?

A. I do.

Q. Are they all in this box yet? [152]

A. Yes, they are.

Q. Will you state whether or not you have prepared a summary of the days that Mrs. Westfall has worked for the Seattle Public Schools during 1945 and 1946?      A. I had it prepared.

Mr. Evans: Will you mark this for identification, please?

(Document, Teacher's Record of Employment, marked as Defendant's Exhibit F for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit F, will you state whether or not that is a summary of the salary and the days that Mrs. Westfall worked that you have prepared?      A. Yes, it is.

Q. Will you state whether or not all of the information which is on Exhibit F is contained in the

(Testimony of Florence Wayman.)

books and records of the Seattle School District No. 1?      A. Yes, that is right.

Q. I notice on the left-hand side of that document there are some pencilled notations. Will you state who made those?      A. I made those.

Q. Of what if any significance are those pencilled notations? [153]

A. At that time—'46 and '45—our salary for substitute teachers was \$7.50 a day for a casual substitute. Anyone teaching a school month or 20 days received \$8.50 a day. At that time, Mrs. Westfall, I believe, taught over the twenty days at Latona in one assignment.

Q. Is that the notation that is on the left-hand side?      A. That is what it means, yes.

Q. These books and records which you have brought here and are in this box, will you state whether or not they are the books and records kept in the regular and usual course of business by the School District for the purpose of keeping track of pay rolls?      A. They are.

Q. Will you state whether or not you are the custodian of these records?      A. Yes, I am.

Mr. Evans: I will offer Exhibit F.

Mr. Pennington: No objection.

The Court: It will be received.

(Defendant's Exhibit F received in evidence.)

(Testimony of Florence Wayman.)

# DEFENDANT'S EXHIBIT F

Seattle Public Schools  
Administrative and Service Center  
815-4th Avenue North  
Seattle 9, Washington

January 3, 1951

## Substitute Teaching of Esther Westfall, 1945-46

Month	No. of Days	School	Salary
Oct., 1945			
29, 30, 31.....	3	Madison	\$22.50
Nov., 1945			
1, 2, 7, 8, 9, 12.....	6	Madison	45.00
5 .....	1	Franklin	7.50
Dec., 1945			
3, 4, 10, 11, 12, 13, 14, 18, 19, 20, 21.....	11	Madison	82.50
6, 7 .....	2	High Point	15.00
17 .....	1	West Seattle	7.50
Jan., 1946			
7 .....	1	Madison	7.50
8, 9 .....	2	West Seattle	15.00
10, 11, 14, 15, 17.....	5	Pacific	37.50
21, 22 .....	2	Duwam' h B'd	15.00
28, 29, 30, 31.....	4	Latona	34.00
Feb., 1946			
1, 4-8, 11-15, 18-21, 25-28.....	19	Latona	161.50
Mar., 1946			
1 .....	1	Latona	8.50
6-8, 11-15, 18 .....	9	Beacon Hill	67.50
20 .....	1	Hughes	7.50
21 .....	1	Cooper	7.50
25 .....	1	Lafayette	7.50
26 .....	1	West Seattle	7.50
Apr., 1946			
3 .....	1	Madison	7.50
5 .....	1	Cleveland	7.50
18 .....	1	Highland Park	7.50
23, 24 (1/2 day).....	1 1/2	Cooper	11.50
30 .....	1	Duwamish B'd	7.50
May, 1946			
1, 2, 6-10, 13.....	8	Madison	60.00
14, 15, 16.....	3	West Seattle	22.50
17 .....	1	Lafayette	7.50
20-24, 27, 28, 29, 31.....	9	Highland P'k	67.50

(Testimony of Florence Wayman.)

Month	No. of Days	School	Salary
June, 1946			
3, 4 .....	2	Beacon Hill	15.00
5 .....	1	Madison	7.50
6, 7 .....	2	Cooper	15.00
11 .....	1	Jefferson	7.50
Total days.....		103½	Total salary \$800.50

Admitted January 10, 1951.

Mr. Evans: No further questions. [154]

### THOMAS JOSEPH YINGLING

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Evans:

\* \* \*

Q. Where do you live, Mr. Yingling?

A. 2600 Llewelyn Avenue, Baltimore, Maryland.

Q. Will you state whether or not you have been subpoenaed to come here and testify in this trial?

A. I have.

Q. Will you state whether or not you were the driver of the bus that was involved in this instance about which this action is concerned?

A. I am.

\* \* \*

Q. (By Mr. Evans): Are you still in the Army? A. No, sir.

(Testimony of Thomas Joseph Yingling.)

Q. When were you discharged? [156]

A. May 26, 1947.

Q. 1946 or 1947? A. 1946.

\* \* \*

Q. What was your particular assignment on February 20, 1946? [157]

A. Well, I was to drive a U S Army bus to Seattle at Second and Spring Street and pick up a U S O show and return to Fort Lewis to Service Club No. 1.

Q. That was the specific assignment; but I mean what was generally your assignment in the Army?

A. I was assigned with the motor pool at Madigan General Hospital.

Q. In what capacity? A. As a chauffeur.

Q. How long had you been so assigned to that organization?

A. Well, since I returned from the East Coast to the West Coast. The outfit hit Fort Lewis in August of '45.

Q. And you had been with Madigan General Hospital as a driver since August of '45?

A. Yes, sir.

Q. What kind of a bus was it that you were driving on this particular trip?

A. It was an International K-7.

Q. Do you recall whether or not there was more than one of such buses at the motor pool?

A. Yes, sir.

Q. Do you recall about how many such buses there were?

(Testimony of Thomas Joseph Yingling.)

A. Well, I believe we had close to nine.

Q. Will you state whether or not any of those buses were new buses? [158] A. Yes, sir.

Q. Do you recall approximately how many were new buses?

A. Well, almost all, I should say.

Q. The particular bus that you drove, can you give us any idea how old or how many miles that bus had on it at the time it started out?

A. The particular bus I drove was a brand new bus. It had anywhere from 12 to 15 miles on it when I left Fort Lewis.

Q. Prior to leaving Fort Lewis, will you state whether or not you made any type of an inspection of the bus?

A. Well, sir, we had what we called a first echelon maintenance that we had to perform before starting of the motor and leaving Fort Lewis, which included checking the gas and oil, the lights, windshield wipers, tires, brakes, emergency brake and everything that required safe operation on the bus.

Q. Will you state whether or not in the course of that inspection you made any observation of a governor on the bus? A. Yes, sir, I did.

Q. Can you give the Court any idea or description of what a governor looks like or where it is located on the bus?

A. Well, a governor on a bus is located directly under the [159] carburetor. It is approximately about five inches long, maybe three-quarters of an

(Testimony of Thomas Joseph Yingling.)

inch thick and an inch and a half wide. It is of white metal which is outstanding to the color of the carburetor.

Q. Will you state whether or not there are any devices of any kind on a governor which would in any way indicate whether or not the governor had been tampered with? A. Yes, sir, there is.

Q. What type of devices are there?

A. There is two pieces of spring wire that are sealed with a lead seal.

Q. What is the purpose of the seal,—the lead seal that you speak of?

A. The purpose of the lead seal is to keep anybody from tampering with the governor. By another man operating that bus and making his first echelon check he will find if that governor has been tampered with and it is his duty to report it to the motor pool.

Q. Will you state whether or not you observed anything about this particular bus before you made this trip to Seattle with which we are concerned here?

A. From my examination of the vehicle, I found the governor seal intact—in place.

Q. Will you state whether or not your superior officers [160] or non-commissioned officers, at that time, had any practices which caused you to be particularly careful about your first echelon maintenance?

A. Yes, sir. We had a staff sergeant that would go around into the motor pool where the vehicles were parked and would leave the air out of tires,

(Testimony of Thomas Joseph Yingling.)

unhook the distributor and so forth—the rotary cap in the distributor and pull the spark plug wires out. It was just a way of keeping the vehicles in first-class shape so that the second echelon wouldn't be too great after a weekly inspection.

Q. What would be his purpose?

A. His purpose would be to keep the men on the ball to keep checking them, in that our personnel was very small and we had a great deal of vehicles.

Q. How did jimmying up these vehicles in any way affect the efficiency of the personnel?

A. Well, sir, by each and every man making his daily check every time a bus went out, it eliminated the possibility of greater damage being done to the vehicle.

Q. Do you recall the manner in which this bus operated, so far as its speed was concerned?

A. Yes, sir. [161]

\* \* \*

Q. Will you state whether or not anything occurred on your trip from Seattle and back to Fort Lewis that would indicate whether or not the governor was or was not functioning?

A. The governor was functioning, sir.

Q. How could you tell?

A. Particularly on a long hill, where the bus would hit 35 and then you couldn't go no faster. You would have to wait until the speedometer dropped below 35 before the accelerator would allow gas to go into the carburetor.

(Testimony of Thomas Joseph Yingling.)

Q. What kind of brakes were on this particular bus?

A. There was a hydraulic brake with a hydraulic booster.

Q. Will you state whether or not anything came to your attention that would indicate to you whether the brakes were working satisfactorily or not?

A. Yes, sir. When I first left the motor pool I found the brakes to be rather grabby; the slightest touch would stop them. Being unaccustomed to the new bus [162] and the new brakes, it was a little trouble getting into Seattle with the stopping and starting of the bus. But on my return trip I had just about gotten it to the point where I could regulate that pressure on the brake.

Q. Will you state whether or not on this particular bus there were any signs or plates or pieces of paper or anything that gave any instructions as to the maximum speed of the bus?

A. Yes, sir. There was an inspection plate on the bus that the speed was 35 miles per hour.

Q. Where was this inspection plate?

A. Directly in front of the driver, sir.

Q. Can you give us any idea of the size of the letters or numbers on this inspection plate?

A. The inside finish of the bus was OD and the letters were stenciled on in white paint, I would imagine about an inch high, sir.

Q. Can you recall of your own memory now the fastest speed you ever attained on this entire trip?

(Testimony of Thomas Joseph Yingling.)

A. I would say no faster than 38 miles per hour, sir.

Q. How could you get up to 38 miles per hour with a governor on it that limits it to 35.

A. Going downhill, the weight of the bus would let the governor slip maybe three miles—the torque in the [163] driveshaft. The wheels would go faster than what the motor was running and allow slippage of some kind in the clutch. [164]

\* \* \*

Q. Do you recall approximately how many passengers you had on the bus?

A. I would say possibly fifteen, sir.

\* \* \*

Q. Handing you Exhibits A, B and C, will you look at those exhibits and each of them and state whether or not you can recognize the view depicted in those pictures? A. Yes, I do.

Q. Can you tell us what that view depicts? [165]

A. It shows the driver's seat and the seat directly behind the driver; and also a hand rail behind the driver, sir.

Q. Will you state whether or not that view is similar to the same type of view of the interior of the bus you were driving on this particular night?

A. Yes, sir.

Q. With particular regard to the vertical hand-rail and the horizontal rail that is shown in that picture, do you recall whether or not on this particular bus there were such rails present?

A. Yes, sir, there was.

(Testimony of Thomas Joseph Yingling.)

The Court: Do you see anything different in those pictures from the bus that you drove that night?

The Witness: No, sir; not a thing different.

Q. (By Mr. Evans): Do you recall any conversation between yourself and any one of your passengers on the trip from Seattle back to Fort Lewis?

A. No, sir; not outside of Mrs. Westfall asking me to turn the lights on, sir.

Q. Do you recall when or where that occasion occurred?

A. Well, the exact spot on the road, sir, I wouldn't remember. All I could do is make a guess at that, sir.

Q. Do you recall what the occasion was when she wanted lights on? [166]

A. I believe it was to sort some sheet music for an accordion.

Q. Do you recall where Mrs. Westfall was sitting on the bus? A. Directly behind me, sir.

Q. Will you state whether or not Mrs. Westfall or anybody else on the bus made any remarks to you in regard to your driving? A. No, sir.

Q. If anyone had made any remarks to you in regard to your driving, will you state whether or not now you would remember that?

A. No, sir.

Q. As I understand, you would not remember it if they had?

A. If they had made any remarks, sir, I would have remembered it.

Q. Will you state whether or not you recall

(Testimony of Thomas Joseph Yingling.)

hearing any groans or whistles or any exclamations from any of your passengers that would in any way indicate to you whether or not they were pleased or displeased with your driving?

A. Well, sir, as we passed the Boeing factory in Seattle, the group was singing almost constantly until we hit Fort Lewis. The only groans or moans I heard were when I made my sudden stop, [167] sir.

Q. Do you recall whether or not Mrs. Westfall asked you to turn the lights on more than once?

A. I would say at lease twice, sir.

Q. Were there any other remarks made to you by anyone other than those that you have mentioned as to Mrs. Westfall asking you to turn the lights on up until the time you made the sudden stop?

A. No, sir, no remarks.

Q. What type of highway is it between Seattle and Fort Lewis, a two-lane highway or four-lane highway?

A. Four-lane.

Q. Four-lane all of the way?

A. All of the way, sir.

Q. At the time that you made this sudden stop that you have mentioned, in what lane were you driving?

A. At the time I made the sudden stop, sir?

Q. Yes. A. In the left-hand lane, sir.

Q. That would be the lane nearest the center of the——

A. Yes, sir.

Q. What was the occasion for you to be driving in the left-hand lane rather than the right-hand lane?

(Testimony of Thomas Joseph Yingling.)

A. I believe there was a tractor and trailer parked on the right-hand lane, not quite off the road, on the soft shoulder, and I had to go out to the center lane [168] to pass him. And before I could slip into the right lane, a private car passed me on the right. As I was waiting for an opening to get back to the right-hand lane, I noticed this car coming from the left. I say when I noticed him, his front wheels were just over the center line.

Q. Where did this car come from?

A. Well, sir, he either came from a dirt road or a driveway. There was no red light or any indication of a stop for intersection. In order for me to stop the bus to avoid a collision, I applied my brakes momentarily to slow the speed of the bus down.

Q. Approximately how fast were you going at the time this occurred?

A. I would say between 20 and 25 miles an hour, sir.

Q. What was this other car that you speak of in the process of doing; was it crossing your—

A. No, sir. He was making a left-hand turn and his intention was to be going in the same direction that I was, sir.

Q. How far were you, as near as you can remember, from this other vehicle that you mention at the time you first observed it?

A. I would say 30 to 35 feet, sir.

Q. Will you state whether or not the application

(Testimony of Thomas Joseph Yingling.)

of your [169] brakes caused the bus to come to a complete stop?      A. No, sir, it didn't.

Q. Now, prior to this time, had you had occasion to in any way notice the position that Mrs. Westfall was in, in the seat directly behind you?

A. Yes, sir, I did.

Q. What was that position she was in?

A. Well, sir, she was sitting on an angle, like her feet were towards the aisle.

Q. Her back then would be in what direction with respect to the bus?

A. To the left-hand side.

Q. And her right side would be in what direction with reference to the bus?

A. Right-hand side would be to the back of the seat, sir.

Q. Do you recall whether or not she had any music or anything else that she was examining?

A. Well, sir, at the time—I don't recall whether she had any music in her hand—but I know there was music on the seat alongside of her, sir. I believe it was necessary to get in this position in order to pass the music to the back of the bus.

Q. What happened when you applied your brakes to avoid hitting this car?

A. Well, sir, to my recollection I believe Mrs. Westfall [170] was thrown off the seat, and before I could stop the bus completely to offer assistance, whether Mrs. Westfall had help to get back onto the seat I don't remember, but before I could get over to the right and park my bus, she was already in

(Testimony of Thomas Joseph Yingling.)

her seat. I asked her if she was hurt and she said no, that she was not hurt. So I continued on my trip to Fort Lewis, and on the way I told her that I would stop at the dispensary at Section 1 of Madigan Hospital. When we arrived to Fort Lewis she refused to go to Section 1 dispensary, so we went to Service Club No. 1 where the USO show was to be put on. As we arrived at the Service Club, a PFC Moller who I believe had another trip earlier in the evening that went to another club, was there at Service Club No. 1. He and myself helped Mrs. Westfall from the bus. The hostess at the club, I believe, offered Mrs. Westfall an aspirin or an Alka-Seltzer or something to settle her nerves. I noticed no limp of any kind.

During the show it was general procedure to regas the bus and check the oil for the return trip. So I wasn't at the service club very long after we arrived.

Q. At the time you started back on the trip, will you state whether or not you returned to the service club? [171]

A. Yes, sir. I returned to the service club to pick up the group where I again Mrs. Westfall and this PFC Moller and this hostess, too, was almost insistent that she go. But she said it was all right, that it was a minor thing, that it couldn't be helped.

Q. You mentioned, I believe, that you insisted that she go somewhere; go where, what do you speak of?

(Testimony of Thomas Joseph Yingling.)

A. We insisted that she go to the dispensary.

Q. What kind of services were available at the dispensary?

A. At the dispensary there was a doctor on duty. He would have examined her as to whether she had broken limbs or sprains. He would have rendered her medical assistance. It was a regular dispensary.

Q. Will you state what Mrs. Westfall's attitude was with regard to that offer?

A. Well, sir, she said it wasn't necessary; that she was all right, and that it was late in the evening and she didn't want to hold the group up any longer; that the parents of the group would complain if they got back too late.

Q. Do you recall where it was that this sudden stop or sudden slowing down occurred with respect to any known landmark on the highway?

A. Well, sir, I believe after I left South Tacoma, as you approach a roller skating rink on the right; and on the [172] left was a riding academy. Whether the riding academy is still there, I don't know. But I believe this car came from a dirt road alongside of the riding academy.

Q. Now, the best of your recollection was that it was inside or outside of the City of Tacoma?

A. I believe it was outside of the city limits, sir.

\* \* \*

Q. When I speak of city limits there, I believe I said city limits of Tacoma. What I would like to refer to is the city limits of South Tacoma; is

(Testimony of Thomas Joseph Yingling.)

that what you are referring to or to just the city limits of Tacoma?

A. Well, sir, I am not familiar with either the city limits of South Tacoma or of Tacoma. I don't recall where either of them are, sir.

Q. Will you state whether or not to your recollection you were in the city or out of the city?

A. I think I was out of the city, sir.

Q. If you had not applied your brakes in the manner in which you did, will you state whether or not in your opinion there would have been a collision?

A. Definitely, sir.

The Court: Do you recall whether you were approaching an intersection at the time of this——

The Witness: No, no intersection, sir. If I [173] remember rightly it was just a dirt road. It might only have been a driveway that went up to this academy. It may have went only fifty feet off the highway. I don't recall, sir. But it was definitely no intersection.

The Court: And that came from your left?

The Witness: From my left, sir.

The Court: And across the two lanes on the left-hand side of the highway?

The Witness: Yes, sir.

The Court: And across the center line?

The Witness: Yes, sir.

The Court: In front of you?

The Witness: Directly in front of me.

Q. (By Mr. Evans): How soon, before you slowed down suddenly as you described, before you were aware of the fact that Mrs. Westfall was no longer on her seat?

(Testimony of Thomas Joseph Yingling.)

A. Well, sir, I don't recall how long it was. But I will say I had gone maybe fifty feet before I noted she was on the floor, sir. The only way I noticed she was on the floor was by the passengers on the bus came forward.

Q. Why didn't you just immediately stop right there and investigate and see what had happened?

A. On account of the traffic, sir. [174]

Q. Will you state whether or not the traffic was heavy or light or how can you describe it?

A. I would say the traffic was just medium, sir. It was rather foggy, just in spots.

Q. Will you state whether or not you believe that you could have stopped with safety immediately upon your discovering that Mrs. Westfall had fallen from her seat?

A. Not with safety, no.

Q. What would have been unsafe about that?

A. Stopping in the left-hand lane, sir.

Q. After this incident and from there on in to the Post, will you state whether or not any remarks were made to you with reference to your driving?

A. No, there wasn't.

Q. By Mrs. Westfall or anyone else on the bus?

A. By no one on the bus, sir. [175]

\* \* \*

Q. What is the maximum speed you attained in returning to Seattle?

A. I would say approximately 35, sir.

Q. Will you state whether or not you drove the same bus back you drove down?

A. Yes, sir, I did.

(Testimony of Thomas Joseph Yingling.)

Q. Did you state whether or not there was anything to indicate to you on the return trip whether or not the governor was operating?

A. The governor was still working, sir. That governor controls your speed in all forward gears. Take in third gear, I would say the top speed in third gear would be 18 miles per hour. When you reach that speed the bus just wouldn't go no faster on an incline or a hill or level stretch or which.

Q. How many forward speeds did this bus have?

A. Five, sir.

Q. In fifth speed what was the maximum you could get out of it?

A. 35, sir. [176]

\* \* \*

### Cross-Examination

By Mr. Pennington:

\* \* \*

Q. You say you talked to Mrs. Westfall immediately after the accident and offered to take her directly to the dispensary?

A. Yes, sir, I did.

Mr. Pennington: Mrs. Westfall, will you stand up, please?

(Mrs. Esther Westfall stands before the Court.)

Q. (By Mr. Pennington): Is this the woman who was thrown from the seat on the bus to the floor?

A. I believe she is, sir.

Q. Is she the woman whom you offered to take to the dispensary?

A. Yes, it is.

Q. She appears to you now about like she did then?

(Testimony of Thomas Joseph Yingling.)

A. No, she is lighter in weight. The face is the only thing that is vaguely familiar, sir.

Q. How many times did you talk to her during the course of the evening? A. I would say five.

Q. About five different times? A. Yes.

Q. You think this is the woman definitely whom you [179] offered to take to the dispensary?

A. Definitely.

\* \* \*

Mr. Pennington: Mrs. Bruck, will you stand, please?

(Mrs. Bruck stands before the Court.)

Q. (By Mr. Pennington): Do you recognize that woman? A. No, sir.

Q. Was she ever thrown from the seat of a bus which you were driving? A. No, sir.

Q. Did you ever offer to take her to the dispensary? A. No, sir.

Q. On the other trip you made from Seattle to Fort Lewis were any musical instruments on the bus?

A. That I don't know, sir. The troupe I picked up was a magician's.

Q. Did you have a ticket on that?

A. No, sir.

Q. You don't know anything about it?

A. I reported to the hostess at the USO club.

Q. You do not recognize this woman at all? [180]

A. No, sir.

\* \* \*

Q. (By Mr. Pennington): Why is it that you

(Testimony of Thomas Joseph Yingling.)

would have a particular recollection of Mrs. Westfall's name on this trip and not of the other person on the other trip?

A. Mrs. Westfall was the one that was hurt and I have been contacted by the Bureau during the past four years.

Q. This other trip that you made to Seattle, was it before or after this particular trip?

A. I believe it was before, sir.

Q. About how long before?

A. Well, I would say maybe a month, sir. [181]

\* \* \*

Q. How many of those were new buses?

A. I would say most of them were, sir. We had a bunch of old buses but we wouldn't use them on such a long trip.

Q. How long had you had these new buses in the motor pool?

A. I would say approximately a week, sir.

Q. About one week? A. Yes.

Q. And before that what had you had?

A. We had some old buses.

Q. And you had used the old buses prior to that?

A. Yes, sir. [182]

\* \* \*

Q. Yes; before you left on the trip to Seattle you made a 1st echelon inspection? A. Yes, sir.

Q. And this vehicle did have a governor on it?

A. Absolutely, sir.

Q. You stated that those governors are sealed with two spring wires and a lead seal, is that correct? A. Yes.

(Testimony of Thomas Joseph Yingling.)

Q. To prevent their being opened and readjusted? A. Yes, sir.

Q. Is there any other way that you can adjust those governors? A. No, sir. [183]

\* \* \*

Q. Were these vehicles—especially with respect to governors were they inspected regularly by your superiors at the motor pool? A. Yes, sir.

\* \* \*

Q. I am speaking with particular reference to the governor, Mr. Yingling—to see that they were functioning properly?

A. Yes, sir, they were tested regularly.

Q. That they had not been unsealed?

A. Yes, sir.

Q. Do you know whether or not it was a common practice among soldiers in the Army, at that time, to readjust their governors so they could drive at whatever speed they wanted to?

A. No, sir, I don't.

Q. Mr. Yingling, you stated that you were a driver in the Army for 27 months, did you not?

A. Not quite 27, sir.

Q. Well, during most of your time in the Army, you stated, you were a driver?

A. Yes, sir, I was. [184]

\* \* \*

Q. You stated this was a new truck and the brakes were grabby; what do you mean by that?

A. I wouldn't say they were grabby. I would say

(Testimony of Thomas Joseph Yingling.)

I was just unfamiliar with the brakes at the time I made the trip.

Q. You used that expression, that they were grabby? [186]           A. Yes, sir.

Q. What did you mean by that; did you mean they would stop suddenly?

A. The slightest pressure with your foot would stop them, sir.

Q. And you had some difficulty in that respect with this vehicle while you were en route to Seattle?

A. While I was en route to Seattle, yes, sir.

Q. And on the return trip?

A. No, sir, I had no difficulty.

Q. It was gone by then?

A. Yes, sir; I imagine that my trouble on the way over was that my brake was just a little bit too fast. This hydraulic booster is the same as an air brake almost. It will stop a truck on a dime or slide the rear wheels. And being a new bus and used to driving just trucks and old buses, I was unfamiliar with the brakes. [187]

\* \* \*

Q. Did you make your report of this accident?

A. No, sir.

Q. Why didn't you; don't Army regulations require that?

A. Yes, sir; if the person was injured. But it was just such a slight incident that it didn't seem like it was necessary to report it.

Q. Then why did you insist on so many repeated occasions that she go to the dispensary?

(Testimony of Thomas Joseph Yingling.)

A. Well, sir, it was the custom to insist.

Q. If anybody was injured or possibly injured?

A. Yes, sir. [188]

Q. You assisted her in alighting from the truck when you arrived at Fort Lewis?

A. Yes, sir, I did.

Q. Why did you if it was a slight incident and not injured?

A. She was still nervous from the stop, sir.

Q. So nervous that she required assistance from the truck?

A. Well, sir, she was a heavy woman, and I always assisted older women than I am, sir. It is a custom.

Q. Do you now whether she was thrown from the seat or not?

A. To my estimation, I believe her arm went over the top of that bar; actually, she didn't go all of the way to the floor outside of maybe one knee.

Q. You stated that during the course of this trip you heard no groans or moans, I believe was the expression you used?

A. That is right.

Q. Except when you made your sudden stop?

A. That is right.

Q. Is that the time at which she was thrown forward from her seat?

A. Yes, sir. [189]

\* \* \*

Q. When you made this sudden stop, you applied your brakes?

A. Yes, sir.

\* \* \*

Q. Then you didn't make a sudden stop?

(Testimony of Thomas Joseph Yingling.)

A. I made a sudden stop but never came to a complete stop, in other words.

\* \* \*

Q. You stated, as I understood it, that when you passed this tractor and trailer, you had moved to the left-hand lane or the inside traffic lane?

A. Yes, sir.

Q. How far back down the highway was that from the point at which you did your sudden braking?

A. That I don't recall, sir.

Q. Well, approximately what distance to give me an idea?

A. Well, maybe 150 feet.

Q. Then why didn't you pull back to the right-hand lane?

A. Another vehicle passed me on the right, sir. [190]

Q. But it had already passed you before you braked?

A. Yes, sir; it had.

Q. The car which came in front of your bus was coming from your left?

A. Yes, sir.

Q. And it was making a left-hand turn into the same traffic lane which you were following?

A. Yes, sir.

Q. Why didn't you pull into the right-hand lane at that time instead of braking suddenly?

A. Well, sir, after I passed this tractor and trailer I was manipulating to get into the right-hand lane, at the time, when this other vehicle passed me on the right. And while I was still looking for an opening to get into the right-hand lane, this other vehicle came out from the left.

(Testimony of Thomas Joseph Yingling.)

Q. Did the other vehicle have its lights burning?

A. Yes, sir, he did.

Q. Why didn't you see it when it pulled out into the highway?

A. That is an awfully wide highway, sir.

Q. That is a four-lane highway, I believe you said?

A. Yes, sir.

Q. That is the ordinary thoroughfare or arterial highway?

A. Yes. [191]

Q. Did you see this other car pull onto the highway?

A. No, sir; I didn't.

Q. What kind of weather conditions did you have that evening?

A. Just foggy in spots; mostly the hollow spots. The amber lights on the highway were lit.

Q. Well, they are always lit, I believe, at night. Was it raining?

A. No, sir. [192]

\* \* \*

Q. You are familiar with the business district of South Tacoma?

A. Not very, sir.

Q. Are you positive you had gone through the business district?

A. Absolutely, sir.

Q. Do you know whether that business district known as South Tacoma is within the city limits of the City of Tacoma or not?

A. No, I don't know.

Q. From the business district known as South Tacoma, how far had you gone before the accident occurred?

A. I would say two miles.

Q. Two miles from that point. You were traveling in what direction?

(Testimony of Thomas Joseph Yingling.)

A. Towards Fort Lewis, sir. [194]

\* \* \*

BERNARD E. McCONVILLE

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Evans:

\* \* \*

Q. Will you state your qualifications as a doctor, please?

A. Graduate from the University of Nebraska Medical School in 1936; interned at Providence Hospital in Seattle; post graduate course, University of California and Harvard University; and assistant and associate to Dr. H. T. Buckner for the past fourteen years.

Q. Will you state whether or not you are presently licensed to practice in the State of Washington?

A. Yes, sir.

Q. What if any specialty do you have?

A. Orthopedic surgery.

Q. Will you state whether or not you have examined Mrs. Westfall at my request?

A. Yes, sir. She was examined on October 3, 1950.

Q. Will you state the complaints which Mrs. Westfall gave to you with regard to her condition?

A. The first was persistent pain of the low back. She states that her back aches almost con-

(Testimony of Bernard E. McConville.)

stantly; two, that pain of the back is increased with prolonged standing; three, that she has swelling of the left ankle increased with use; four, she has throbbing, aching pain of the left ankle and lower leg; five, the pain of the ankle is increased with changes of the weather; six, because of pain of the ankle she favors the use of her left leg; seven, she has stiffness and limited function of the left ankle joint.

Q. Will you state whether or not you caused any X-rays to be made?

A. Yes, sir. I took X-rays of both ankles for comparison. I took X-rays of her back.

Q. Do you have those X-rays with you there now? A. Yes, sir.

Mr. Evans: I would like to have them marked for identification, please. [196]

(X-rays marked as Defendant's Exhibits G, H, I, J, K and L for identification.)

Q. (By Mr. Evans): Can you tell the Court the things which you did in the course of your examination of Mrs. Westfall with regard to having her perform certain functions and what the results of those activities indicated to you?

A. She was given a thorough physical examination with particular emphasis on the orthopedic phase. The general physical examination was not remarkable. The examination of the back, there was noted an increase in both the dorsal and the lumbar curves of the back. In other words, the curvature of the back is increased. Some tender-

(Testimony of Bernard E. McConville.)

ness was elicited over the low back portion, over the sacro-iliac region. I found no evidence of muscle spasm and the patient was able to bend forward to within six inches of the floor. Her backward bending, lateral bending and rotation of the spine were within normal limits. She was able to stand on her left foot and raise up on the toes and she was able to stand on the right foot and raise up on the toes. She was able to assume a full squat and to recover without difficulty. She was able to stand in the straddle position, and sway her hips from side to side or rotate them without difficulty. [197]

In lying down in the prone position she was able to contract the muscles of her spine equally. She could raise both legs from the table without difficulty. She could raise her chest and the legs from the table without difficulty. The contractures of the muscles of the back during this examination were equal and normal.

Q. I believe you made a statement to the effect that both the dorsal and the lumbar curves had increased. Can you state whether or not that condition might be caused from having previously had a weight of somewhere around 250 pounds?

\* \* \*

A. The weight would be a factor in it. The increase in those curves are due to posture.

Q. (By Mr. Evans): As a result of that examination, what are your conclusions as to the condition of her back?

A. My conclusion from my examination on the

(Testimony of Bernard E. McConville.)

date of October 3, 1950, was that she had a normal functioning back with the pain factor based primarily on the posture. [198]

Q. Do you consider her posture as good or bad?

A. Bad.

Q. With regard to Mrs. Westfall's being able to bend within six inches of the floor; will you state whether or not that is considered a good or bad condition, considering her age?

A. I think that is a very good range of motion.

Q. I believe you stated that lying on her stomach she was able to extend both of her legs and chest, is that correct?

A. Yes, sir.

Q. Will you tell us whether or not that is a good or bad condition, considering the plaintiff's age?

A. It is good—it is a very good range considering age. It is very good for anyone to be able to extend both the legs and the chest at the same time.

Q. With regard to the statement you made of being able to put all of her weight on either her right or left foot and raise to the toes without difficulty; would that phase of the examination indicate anything to you with regard to whether or not there was any injury to her ankle or back?

A. Well, it speaks in favor of both her back and her ankle to be able to bear the full weight of the body on one [199] leg. If there is excessive difficulty or trouble in the back, they have difficulty in putting the full weight on one side because it shifts the normal weight bearing load.

(Testimony of Bernard E. McConville.)

By the same token, if there is an injury any place down along the leg, it is most difficult for them to throw the full weight of the entire body on that part without some complaint.

Q. With regard to your examination of Mrs. Westfall's ankles, and particularly her left ankle, will you state what if anything you found with regard to that examination?

A. The legs were measured both in length and circumference, taken at definite levels so that the measurements would be at equal levels. The thighs were found to measure 22 inches equally. The knees measured  $15\frac{1}{2}$  inches equally. The measurements of the lower legs showed a quarter-inch variation on the left; the right measuring 15 and the left  $15\frac{1}{4}$ . There was noted a varicosis of both lower legs. It was also noted that the ankles measured 11 inches equally. There was no variation by measurements. Also, the feet measured  $10\frac{3}{4}$  inches equally. There was noted a second degree type of flat foot with a pronation of the foot. The reflexes in testing the motor [200] reflexes of the lower legs, they were all present and they responded equally; there were no abnormal reflexes.

There was no variation to pinpoint or soft touch examination for the sensation. She was able to raise her legs to 90 degrees bilaterally. There was no clinical variation by observation of either the left or the right ankle. The patient complained of some generalized tenderness of the ankle upon palpation. The Patrick's test, rotation test, and the leg thrust test produced some pain which she

(Testimony of Bernard E. McConville.)

located in the region of the lumbo-sacral joint.

X-rays were taken of both the left and right ankle for comparisons. These X-rays showed a clear joint surface and there was no evidence of either old or recent bony injury or bony pathology.

Q. If there had been an injury some four to five years ago which had been bothering her appreciably all during this period of time, would you state whether or not in your opinion some evidence of that would have shown up in an X-ray?

A. Well, if a joint has been injured over a period of years and there has been persistent symptoms, you would normally expect to see some variation in the X-ray films. In other words, you would expect to [201] pick up a traumatic arthritis of the joint.

Q. Handing you the X-rays which I believe are Exhibits G to L, can you pick out among those which are the X-rays of the ankles?

A. These are the X-rays of the ankles (indicating).

Q. That is Exhibits K and L?

A. K and L. Exhibit K—this is an X-ray taken of the right ankle from front to back and also from side to side. This ankle presented a normal ankle joint surface. It was taken as a comparison for the film taken of the left ankle which again was taken in both the front to back and side to side views. This X-ray also showed a normal appearing joint surface and compared the same with that of the right.

(Testimony of Bernard E. McConville.)

Mr. Evans: I would like to offer Exhibits K and L.

Mr. Pennington: No objection.

The Court: K and L may be received.

(Defendant's Exhibit K received in evidence.)

(Defendant's Exhibit L received in evidence.)

Q. (By Mr. Evans): With regard to the other X-rays you have there, what portions of the body are the X-rays of?

A. These four remaining X-rays, starting with Exhibit [202] H—this is an X-ray taken from front to back of the lower part of the back, starting from the lower ribs and including the upper margins of the hip joints.

Q. Is there anything in that X-ray that indicates any deformity or any injury to you?

A. No, sir. Exhibit G—we can take Exhibit G and Exhibit J. These X-rays are two X-rays taken at an oblique view. In other words, they are not quite a side to side view nor are they a front to back view; it is an angle taken in between, strictly an oblique view. They visualize the articulating joints of the back. I was unable to demonstrate anything abnormal from that.

Exhibit I was an X-ray taken from side to side. This X-ray showed an increase in the lumbo-sacral angle and also it showed a slight hypertrophic list-  
ing of the third lumbar vertebra.

The Court: Could that be due to trauma?

The Witness: Possibly. It could possibly be due

(Testimony of Bernard E. McConville.)

to the normal findings of a back of 45 years of age.

Mr. Evans: I offer Exhibits E, F, G, H, I and J in evidence.

The Court: They may be received.

(Defendant's Exhibits G, H, I, [203] and J were received in evidence.)

Q. (By Mr. Evans): From your examination as to the ankle, could you find any evidence of residual injury to the ankle—to the left ankle?

A. No, sir.

Q. Now as to the back, if there were an injury back in 1946, have you considered it sufficiently to be able to state any percentage of the injury to the comparison of the normal functioning back?

A. From the range of motion presented by the patient and the freedom of motion presented by the patient, considering the fact of the patient's complaints, and giving the patient the benefit of the doubt from a possible muscle or ligamentous injury to the low back area, I would say from my examination that her disability resulting, if any, should not exceed a five per cent permanent disability compared with a normal functioning back.

Mr. Evans: You may cross-examine.

#### Cross-Examination

By Mr. Pennington:

Q. Doctor, in stating the condition of the back and ankle as reflected by the X-rays taken by you, a few [204] minutes ago, was your reference to the findings as to the bone structure?

(Testimony of Bernard E. McConville.)

A. Of these?

Q. Yes.

A. Yes; this is an interpretation of the X-rays themselves.

Q. In so far as the bone structure of the back and ankles is concerned?

A. In so far as the bone structure is concerned, yes, sir.

Q. Considering the type of injury which Mrs. Westfall apparently sustained—that is, a severe sprain of the ankle and back, affecting the ligaments and muscles——

A. Yes, sir.

Q. ——would that necessarily be reflected in X-rays of that kind?

A. No, sir.

Q. Dr. McConville, you have never treated this plaintiff, have you?

A. No, sir.

Q. And this examination was made of her at the request of the Government?

A. Yes, sir.

Q. For the purposes of presenting testimony to this Court as to your findings in this action? [205]

A. I imagine so, yes, sir.

Q. When you expressed your opinion as to a possible disability of five per cent, would you say that is or is not subject to variation in either direction, more or less?

A. In my opinion it was not to exceed that. I felt that there would be some variation from no disability to five per cent figuring on the basis of——

Q. That was on the basis of your opinion and not a firm and fast fact?

A. There is no firm and fast fact in [206] medicine.

## THOMAS JOSEPH YINGLING

having been previously sworn, resumed the stand for further examination and testified as follows:

Cross-Examination  
(Continued)

By Mr. Pennington: [207]

\* \* \*

Q. With reference to the inside of these buses, did they have the vertical and horizontal protection rails in the old buses? A. Yes, sir.

Q. All of them? A. All of them, sir.

Q. There were no buses in that pool that did not have a vertical and horizontal protection in front of them, facing the left front seat?

A. No, sir. [208]

\* \* \*

Q. Did you state that Mrs. Westfall was seated with her back to the window? A. Yes, sir.

Q. With her feet on the seat? A. No, sir.

Q. How then was she sitting?

A. She was on the right-hand side of the seat.

Q. She wasn't seated next to the window?

A. No, sir; her back was just facing the window.

Q. Where were her feet and legs?

A. I imagine they were towards the aisle, sir.

Q. Was there a guard rail protecting the end of the seat? A. Yes, sir.

Q. How did she have her feet and legs toward the aisle?

A. Well, sir, she could have one foot between one part of the pole and one foot between the other part of the pole.

(Testimony of Thomas Joseph Yingling.)

Q. I mean is there a hand rail on the seat?

A. No, sir. [210]

Q. There is no hand rail over the end of the seat?

A. No, sir. I don't believe there is even an arm rest on the seat.

Q. Did she have her feet and legs completely around the end of the seat or angled towards the front?

A. I would say they were more or less angled towards the front of the bus.

Q. How far out toward the left-hand side of the bus did this rail which you state was there extend?

A. I would say at least 14 inches.

Q. Then it did not extend as far out as the seat extended? A. I don't get your point.

Q. The horizontal rail in front of the seat occupied by Mrs. Westfall, did it begin at the left-hand side of the bus?

A. Yes, sir, at the wall.

Q. How far out towards the center of the bus did it extend?

A. I would say to within a foot of the center of the bus.

Q. Then it was about the same length as the seat occupied by Mrs. Westfall? A. Yes, sir.

Q. And you said she had sheet music on the seat beside her? A. Yes, sir.

Q. On which side of her? [211]

A. On the left of her, sir.

Q. What was she doing with that sheet music?

A. Well, there was someone in the group that

(Testimony of Thomas Joseph Yingling.)

played an accordion. She was sorting the music, picking out certain numbers that this person wanted to play at Fort Lewis.

\* \* \*

Q. How far were you from this point at which this car followed you before you saw the car? [212]

A. I would say 35 to 40 feet.

Q. From the point at which it crossed the road?

A. Yes, sir.

Q. How fast were you driving?

A. Between 20 and 25. [213]

\* \* \*

### Redirect Examination

By Mr. Evans:

Q. Mr. Yingling, do you recall what the condition of the highway was at the scene where you made this rather abrupt slowing down, as to being level or up or down hill?

A. I believe it was an upgrade, sir.

Q. Can you give us your best estimate as to how steep the grade was?

A. Well, sir, I would say in 200 feet that the grade didn't go up no more than four foot, sir.

Q. Well, four feet in 200 feet, for practical purposes would you say that was almost level?

A. No, sir, I wouldn't say it was almost level. [215].

Q. Do you recall whether or not there was any oncoming traffic which was headed in a general northerly direction at the time of this occasion?

(Testimony of Thomas Joseph Yingling.)

A. Yes, sir, there was. That is the reason why this other car crossed into my lane at the time he did. If he would have stayed where he was, I imagine the oncoming traffic would have hit him. Because he made a rather hasty move and then he had to stop, and then I imagine with this other traffic coming towards him, he had to get out of the way. It was a rather hasty move on his part. [216]

\* \* \*

### Recross-Examination

By Mr. Pennington:

Q. Mr. Yingling, have efforts been made during the course of the last three or four years to contact you concerning this claim of Mrs. Westfall?

A. Yes, sir.

Q. Has the question ever been raised as to whether you were or were not the driver of the bus at the time of this injury?

A. No. They just assumed that I was the driver when they contacted me, sir.

Q. They assumed so; but has there ever been any question raised as to whether or not you were the driver on this particular date?

A. Well, sir, I was the driver. I remember the incident where the woman was thrown from the seat.

Q. Has the question ever been raised as to whether or not you were the driver at the time of this particular accident?

A. No, sir.

(Testimony of Thomas Joseph Yingling.)

Q. By anyone who interviewed you it has never been raised in any way? A. No.

Q. You do not recall the date of this accident?

A. No, sir. [217]

\* \* \*

### BEVERLY BRUCK

called as a witness, by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Evans:

\* \* \*

Q. You are the daughter of Mrs. Bruck who testified for the plaintiff here earlier in this trial?

A. Yes.

Q. Will you state whether or not you were a passenger on this particular bus that we have had reference to in this trial? A. Yes, I was.

Q. Where were you seated on that bus?

A. I was seated exactly behind Mrs. Westfall.

Q. That would be the second seat from the front on the left-hand side? [219]

A. No. I was right behind her on the right-hand, on the aisle side.

Q. I don't believe I quite understand.

A. I was in the second seat on the right-hand side by the aisle. I was sitting right on the aisle side.

Q. Were you sitting in the seat directly behind Mrs. Westfall? A. Yes.

(Testimony of Beverly Bruck.)

Q. Would that be in the double set of seats on the right-hand side of the bus or on the left-hand side of the bus?

A. On the left-hand side of the bus.

Q. You were sitting next to the aisle?

A. Yes.

Q. Mrs. Westfall was right in front of you?

A. No. She was by the windows.

Q. Did Mrs. Westfall talk to you at any time during this trip?      A. Yes, she did.

Q. What was her position in the bus as she was driving along with regard to the way she was seated?

A. She was turned just slightly—just very slightly and with her feet on the floor.

Q. Could you see her feet?

A. No; but they must have been there because they were [220] hanging over the front of the seat.

Q. Will you state whether or not she had her back towards the window?

A. She didn't have her back; she just had her left shoulder.

Q. Do you recall an interview which you had with Mr. Kail here on August 7, 1950?

A. Yes.

Q. Did you talk to him about this accident?

A. Yes, I did.

Q. Did you give him a signed statement of your recollection as to how Mrs. Westfall was sitting in the bus at that time?      A. Yes.

(Testimony of Beverly Bruck.)

Mr. Evans: I would like to have this marked for identification.

(Document, signed statement of Beverly Bruck, marked as Defendant's Exhibit M for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit M, will you examine that and tell me whether or not your initials appear anywhere on the first page? A. Yes, they do.

Q. In one or two places? [221] A. Two.

Q. Will you look at the second page and tell me whether or not that is your signature there?

A. Yes, it is.

Q. And at the time you signed that, do you believe that the statements set forth in there were the truth? A. Yes.

Q. Will you read to yourself, starting with the third paragraph; will you read the third paragraph to yourself?

A. (Witness reads document to herself.)

Q. Didn't you state in that paragraph that Mrs. Westfall was sitting with her back towards the window? A. Yes, I did.

Q. And that is the truth, isn't it?

A. Yes, it is the truth, but she wasn't sitting exactly with her whole back against the window.

Mr. Evans: I would like to offer Defendant's Exhibit M.

Mr. Pennington: No objection.

(Testimony of Beverly Bruck.)

(Defendant's Exhibit M was received in evidence.) [222]

---

DEFENDANT'S EXHIBIT M

Seattle,

Aug. 7, 1950.

I, Beverly Bruck, make the following statement to Edward J. Kail Jr who has identified himself to me as a Special Agent of the Federal Bureau of Investigation. No threats or promises have been made to me to make this statement.

I am 15 years old and at the time of the accident I was 11 years old.

I was a dancer with the U.S.O. Unit, headed by Mrs. Westfall.

On Feb. 20, 1946, I was sitting directly behind Mrs. Westfall, while we were en route to Ft. Lewis to perform at one of the Service Clubs. During the trip Mrs. Westfall was sitting sideways in the seat with her back toward the window and had talked to me during the trip.

When the driver came to an abrupt stop Mrs. Westfall slid off the seat onto the floor directly in front of the seat. I do not recall any bar being in front of her.

I have read the above and have found it to be true and correct to the best of my knowledge.

/s/ BEVERLY A. BRUCK.

(Testimony of Beverly Bruck.)

Witnesses:

/s/ EDWARD J. KAIL JR.,  
Special Agent, F.B.I.,  
Seattle.

Admitted January 10, 1951.

---

Cross-Examination

By Mr. Pennington:

Q. Miss Bruck, how old are you now?

A. 16.

Q. How old were you at the time this accident occurred?

A. 11.

Q. Will you elaborate just a little bit further, Miss Bruck, on the question asked with reference to the third paragraph of your statement there as to just how Mrs. Westfall was seated at the time this accident occurred?

A. Well, from the best I can recall, she was sitting in the first seat on the left-hand side, right in back of the driver—the seat right in back of the driver, and by the windows; and she was slightly turned.

Q. Will you demonstrate in the chair occupied by you how she was seated in this seat?

A. I would sit like this (indicating).

Q. Turned slightly to the right?

A. Yes, slightly.

Q. Did she have her legs up in the seat?

(Testimony of Beverly Bruck.)

A. Not that I recall.

Q. They were facing forward from the seat?

A. Yes.

The Court: Was she conversing with people to her rear? [223]

The Witness: Yes. She would turn like this to me and talk to me.

Q. (By Mr. Pennington): At the time of the accident? A. No, I can't recall that.

Q. You mean during the course of the trip she had spoken to you or asked you different questions?

A. Yes.

Q. Was she thrown from the seat at the time this accident occurred? A. Yes.

Q. Was this at an intersection?

A. To the best I can recall, yes.

\* \* \*

Q. Was she thrown to the floor? A. Yes.

Q. Was there either a vertical—up and down—or horizontal rail in front of the seat occupied by Mrs. Westfall.

A. Not that I can recall. [224]

\* \* \*

Q. Is your recollection definite as to whether or not there were any rails in front of the seat occupied by Mrs. Westfall? A. No.

Q. I say do you recall definitely whether there was or was not? A. No, there weren't. [225]

\* \* \*

## AUSTIN A. SPEERES

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Evans:

\* \* \*

Q. Where are you employed?

A. Fort Lewis, Washington.

Q. In what capacity?

A. Automotive maintenance superintendent.

Q. How long have you been so employed?

A. Five years.

Q. Will you state whether or not your employment has been in a civilian capacity or as a member of the armed services?

A. A civilian capacity.

Q. What experience have you had in the automotive maintenance business?

\* \* \*

A. I have been a mechanic, foreman and supervisor, for the last twenty years. [226]

Q. (By Mr. Evans): Will you state whether or not you are familiar with the operation of what is known as a K-7 International bus as used by the Army?      A. Yes, I am.

Q. Will you state whether or not you know of your own knowledge a governor is an integral part of such a bus?      A. It is; yes, sir.

Q. Do the technical manuals given with this type

(Testimony of Austin A. Speeres.)

of bus have anything in them which will in any way substantiate what you have just told us?

A. Yes, sir; they do. The M-9-222 in that particular bus pertains to the maintenance and overall care of that vehicle.

(Manual marked as Defendant's Exhibit N for identification.)

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit N, will you state whether or not you can identify it? A. Yes, I can.

Q. Without revealing its contents, would you tell us what it is?

A. Yes; it is a TM or Maintenance Manual pertaining to two different types of vehicles with the same type engine and general chassis.

Q. Will you state whether or not this technical manual [227] deals with a K-7 International bus?

A. It does; yes, sir.

Q. Will you state whether or not that is a War Department publication? A. It is.

Q. Will you state whether or not it has as its purpose directions and general technical data with regard to the maintenance of a K-7 International bus? A. Yes, sir; that is it.

Q. Will you state whether or not that is a publication that you in your business are required to follow? A. That is right.

Mr. Evans: I offer Exhibit N.

Mr. Pennington: No objection.

(Testimony of Austin A. Speeres.)

(Defendant's Exhibit N was received in evidence.)

Q. (By Mr. Evans): Will you look at page 145 of that manual? A. 45 or 145?

Q. 145, please. A. All right.

Q. Will you state what you find there with regard to whether or not a governor is an integral part of the engine on the K-7 International bus?

A. It is, yes, sir. [228]

Q. What are the specific words, reading from the book, that you find there?

A. The data as regards the carburetor on this particular vehicle, "Make: Zenith; Series 30BW-11-R; Outline Number: 9994; Type; Downdraft; Governor: Integral."

Q. Will you state whether or not you are familiar with the operation of the particular type of governor that is on this vehicle?

A. Yes, sir, I am.

Q. Will you state whether or not there are any pictures in that manual on about page 145 or a page or two in either direction which show this particular governor? A. Yes, sir there are.

Q. Do those pictures show other portions of the carburetor other than the governor?

A. Yes. They show the position of the governor in relation to the carburetor.

Q. So that we may know for certain what you are referring to, would you mind taking this red pencil and circling on those pictures that portion

(Testimony of Austin A. Speeres.)

of the picture which shows the governor and tell us what page you are making those circles on?

A. Pages 146 and 147 both concern the governor in relation to the carburetor; and they show the position of the governor. [229]

Mr. Evans: May the record show that the witness has so marked in red circles certain portions on pages 146 and 147 of Exhibit N.

Q. (By Mr. Evans): Will you state, Mr. Speeres, whether or not there are any precautions taken with regard to a governor to insure its remaining in the position in which it is initially fit?

A. Governors are always sealed with a seal of one kind or another. This particular governor has two seals on it due to the fact that you can adjust it in two different places, in two different manners.

Q. What is the seal?

A. On this particular governor they are wire with a flat, round lead seal on the wire itself.

Q. Is it possible to adjust or alter the seating on the governor without breaking those seals?

A. Not at all.

Q. Will you state whether or not a governor is a part of these vehicles when they are manufactured and delivered to the Army?

A. Yes, sir; that is part of Army specifications.

Q. Can you tell the Court the purpose which this governor serves?

A. It directly affects the speed of the engine and thereby the speed of the vehicle. [230]

Q. What if anything does the governor control?

(Testimony of Austin A. Speeres.)

A. The flow of gas into the engine from the carburetor.

Q. What is the effect of that control?

A. It restricts the flow of gas after a certain point; the governor allows a certain portion of gas to flow from the carburetor into the engine up to a given volume; and then it simply shuts it off at that point.

Q. Will you state whether or not that has any effect upon the maximum rpm which the motor can attain?

A. Yes, definitely. Governors can be set at any speed above idle speed up to what is considered maximum speed of the engine.

Q. What is the speed at which these governors are supposed to be set when they come from the factory?      A. 3,000 rpm.

Q. What if any effect does that have upon the speed which the vehicle can attain?

A. It regulates the speed of the vehicle as a whole depending on the gear that the transmission is in at the time of travel.

Q. At the fastest speed that the vehicle can have, what is the maximum speed?

A. Fifth speed as delivered from the factory would be 45 miles an hour.

Q. At 3,000 rpm? [231]      A. Yes, sir.

Q. So that would be the maximum speed this vehicle could travel as it is delivered from the factory?      A. Yes.

Q. Do I understand you to say 45 miles an hour?

(Testimony of Austin A. Speeres.)

A. That is factory specifications.

Q. For the governor?

A. That is right, sir.

Q. Will you state whether or not before vehicles are delivered to the troops, whether or not any tests are made with the governors to determine their accuracy?

A. Yes, sir. The vehicle itself is processed to make sure it is completely serviceable and ready for issue to the troops. The governor at that time is set at the local regulation for speed concerning that vehicle.

Q. What would have been the speed that a new vehicle issued at the time mentioned here would have had its governor set for?

A. Irregardless of the age of the vehicle, all buses and like vehicles are set at 35 miles an hour.

Q. Are you aware of any Army regulation requiring such a setting?           A. Yes, sir, I am.

(Pamphlet of Army regulations marked as Defendant's Exhibit O for identification.) [232]

Q. (By Mr. Evans): Handing you what has been marked for identification as Defendant's Exhibit O, will you state whether or not you can identify it without revealing the contents?

A. Yes, sir; I can.

Q. What is it?

A. Army Regulation 850-15.

Q. Will you state whether or not that is a War

(Testimony of Austin A. Speeres.)

Department publication?           A. It is, yes, sir.

Q. Will you state whether or not that publication is binding and controlling over the operation of vehicles at Fort Lewis in February, 1946?

A. Yes, sir, it was.

Mr. Evans: I offer the exhibit in evidence.

Mr. Pennington: No objection.

(Defendant's Exhibit O was received in evidence.)

Q. (By Mr. Evans): Will you turn to page 11, paragraph 27 (d) of Exhibit O and read what it says there to the Court?

A. Paragraph (d): "On all motor vehicles except ambulances, crash trucks, fire trucks, and other vehicles for similar emergency use, regulated governors, when installed, will be set and sealed at the maximum speed [233] indicated on the caution plate. The setting of governors or other speed or pressure relating devices on fire or crash trucks or other vehicles in which the propelling engine is also used to drive mounted equipment will be based upon the limiting maximum speed for driving or operating purposes as determined by the vehicle design. Disciplinary action will be taken in all cases of tampering with sealed governors."

Q. With a governor on a K-7 International bus set for 35 miles per hour, what is the maximum speed, based on your experience, in your opinion, that could be attained?

A. Downhill, remaining in gear, of course, it

(Testimony of Austin A. Speeres.)

could attain a speed of approximately 38 miles an hour.

Q. How can you account for it going three miles an hour faster than the governor is set for?

A. Downhill, the momentum, the weight of the vehicle would cause a certain amount of slippage within the engine itself. In other words, the engine would be forced to turn up higher than its maximum rpm.

Q. On a level run without any hills to affect it one way or another, what would be the maximum speed the vehicle would attain?

A. 35 miles per hour, one mile give or take.

Q. With this particular type of vehicle, a K-7 International, [234] if there were no governor on it at all, what would be the maximum speed it could attain?

A. The maximum speed of a K-7, with no governor, possibly around between 45 and 48 miles an hour.

Q. Will you state whether or not the engine and the gears are designed for it to go any faster than that?

A. No sir, they are not.

### Cross-Examination

By Mr. Pennington:

Q. When were you first employed at Fort Lewis, Washington, Mr. Speeres?

A. I was first employed in March of 1946.

(Testimony of Austin A. Speeres.)

Q. You were not there in the month of February, 1946? A. No, sir; I was not.

Q. You are not familiar with the bus that was involved in the accident of which this case is concerned? A. Not at all.

Q. You had no connection whatever with the motor pools or maintenance departments of Fort Lewis at that time? A. Not at all.

Q. You stated that the governors with which vehicles of this type, the K-7, came equipped, had two seals? A. That is right. [235]

Q. At either point the adjustment could be changed? A. That is right.

Q. In your experience as superintendent of maintenance there at Fort Lewis, have those ever been tampered with by military personnel?

A. Oh, yes; that is right.

\* \* \*

Q. It is necessary to maintain inspections or checks to see that they are kept in the proper order?

A. Periodically. [236]

\* \* \*

### Redirect Examination

By Mr. Evans:

Q. At the time you arrived at Fort Lewis in March of 1946, what kind of buses did they have at Madigan General?

A. I wasn't directly connected with Madigan General. I was connected with what they called

(Testimony of Austin A. Speeres.)

the Post Motor Pool who furnish vehicles for all activities, and at that time they had K-7 buses in addition to several other types.

Q. Have you ever known of a K-7 International bus that did not have the vertical and horizontal guard rails behind the driver?

A. No, sir, to my knowledge; I have never seen one without it.

Mr. Evans: No further questions.

### Recross-Examination

By Mr. Pennington:

Q. When you speak of the K-7 coming from the factory equipped with the governor, you are speaking in reference to those vehicles ordered by and built to military specifications, are you not?

A. Naturally, yes.

Q. Do you know whether or not the Army ever owned vehicles [238] that were not so made to Army specifications?           A. Oh, yes, they do.

Q. They do own many vehicles which are not made to Army specifications?

A. That is right.

\* \* \*

## EDWARD J. KAIL

called as a witness by and on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Evans: [239]

\* \* \*

Q. Where are you employed, Mr. Kail?

A. I am a special agent with the Federal Bureau of Investigation. [240]

\* \* \*

## Cross-Examination

By Mr. Pennington:

\* \* \*

Q. Did you also make an effort to ascertain who was the driver of the vehicle involved in this accident on February 20, 1946? A. Yes, sir.

Q. Did you ascertain who was the driver?

A. Yes, sir.

Q. By what means did you ascertain who was the driver?

A. I ascertained the means through the reports at Fort Lewis with regard to this accident.

Q. You wouldn't happen to have those reports with you? A. No, sir.

Q. Copies of them? A. No, sir. [241]

Q. What information did those reports provide as to who was the driver?

A. They merely stated that Mr. Yingling was the driver.

(Testimony of Edward J. Kail.)

Q. But there was no trip ticket connected with it to verify it?

A. There was no trip ticket connected with it, no, sir.

Q. Did it specify in those reports that date?

A. The date of the accident, sir?

Q. Yes. A. That I can't recall.

Q. At any time during the course of your investigation was another accident brought into the matter in any way which happened at or near the time of this accident? A. No, sir.

Q. Was there ever a question raised as to whether or not Mr. Yingling or another might have been the driver at the time of this particular accident? A. No, sir.

Q. That question was never raised in any way?

A. No, sir.

Q. Did you ever state to any of the witnesses involved in this case or any of the people whom you have interviewed in connection with it that as of two or three months previously the Army or you had not as yet been able to locate the driver of this bus? [242] A. Not that I recall, no, sir.

\* \* \*

Q. Did you ever locate the bus and identify it as the bus which was involved in this accident?

A. No, sir.

Q. Did you make an effort to do so?

A. Yes, sir.

(Testimony of Edward J. Kail.)

Q. Why were you unable to locate the bus; can you tell us in a general way?

A. Yes, sir. In conducting my investigation in the case, the only way that I could possibly locate the bus would be through the number of the vehicle. The only possible place where the number of the vehicle could be would be on the trip ticket. That would be the only possible way of absolutely identifying the bus, would be through the trip ticket. I was unable to locate the trip ticket and therefore I couldn't make a positive investigation of the bus.

Q. Have you been the special agent who has handled the investigation connected with this case for the District Attorney's office connected with this investigation?

A. Yes, sir. [243]

Q. And all efforts through your office to locate this bus and the driver were by you?

A. Yes, sir.

Q. And the particular bus on which this accident occurred has not been identified by you?

A. No, sir.

\* \* \*

Mr. Evans: The Defendant rests.

The Court: Any rebuttal?

Mr. Pennington: I would like to call Mrs. Bruck to the stand, please. [244]

Plaintiff's Rebuttal Evidence

MRS. W. C. BRUCK

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was further examined and testified as follows:

Direct Examination

By Mr. Pennington:

Q. Mrs. Bruck, would you state how many trips this truck made from Fort Lewis, Washington, accompanied by you preceding the 20th day of February, 1946, for a period of, say, a month?

A. It is my recollection that we went every week from about the last week in January for a period of four or five weeks.

Q. On any of these trips were you involved in an incident similar in nature to the one which is the subject matter of this action? A. Yes.

Q. Will you state to the Court just exactly what it was and what happened? [245]

\* \* \*

A. Several weeks before the accident in which Mrs. Westfall was involved we were going from Seattle to Fort Lewis on one of these trips. It was my habit, at the time, to sit in the center of the back seat so that I was facing down the aisle of the bus. I don't know why but that was where I usually sat. On this particular occasion the bus driver was forced to stop by some car turning in front of him and it threw from the back seat down the aisle of the bus. I fell over an accordion and some suitcases in the aisle and landed toward the front of the bus.

(Testimony of Mrs. W. C. Bruck.)

The driver was very concerned about it and asked me about it. However, I didn't feel that I was hurt to any extent. He had pulled off the road, and asked me then and asked me several times between that point and Fort Lewis about the injury and was also very concerned on the way back. I didn't think much about it because I didn't feel that I had been hurt, and that it was not the bus driver's fault in the first place; it was purely an accident. So we left it at that.

Q. (By Mr. Pennington): Where did this incident occur, Mrs. Bruck?

A. My recollection is that it was someplace between South [246] Tacoma and Fort Lewis; I am not sure exactly.

Q. When you fell, did you fall all of the way to the floor?           A. No, I didn't.

Q. Will you describe that in a little more detail, please?

A. Well, I started down the aisle running. I feel I would have gone through the windshield if I hadn't fallen over these suitcases. As it was, I landed apparently with this thumb hitting the back of a seat and with one knee to the floor. I didn't go all of the way to the floor. The only injury that I suffered was to my thumb, and I was badly shaken up.

The Court: Do you remember who the driver of the truck was?

The Witness: It is my impression that it was this man who is here because he had a definite

(Testimony of Mrs. W. C. Bruck.)

southern accent and was very polite and nice to me. I feel sure it is this driver here.

The Court: Could you tell me this: Was it the same driver that drove the night that Mrs. Westfall was injured?

The Witness: No, it wasn't. The driver on the night that Mrs. Westfall was injured was very gruff and not at all polite to any of us. [247]

\* \* \*

Q. Do you have a definite recollection as to the bus which was involved in the accident of February 20, 1946?

A. Yes, I do, because I went forward to help Mrs. Westfall up and was able to step in behind the driver's seat in order to get her on the seat, and I couldn't have done that if there had been a railing there.

Q. Was there a vertical or horizontal rail in front of the seat occupied by her?

A. No, there wasn't.

Q. Was it an old or a new bus?

A. To my recollection it was an old bus. We often had old buses that were minus seats and various pieces of equipment.

Q. The time elements involved in this accident of February 20, 1946, as brought out in testimony here, were they in any way similar to the ones involved on the evening when you were thrown from your seat?

A. Yes, they were. They picked us up in West Seattle as a rule.

(Testimony of Mrs. W. C. Bruck.)

Q. And the same troupe was along on this bus that evening? [248]      A. That is right.

The Court: The same, or were there others?

The Witness: There might have been. We made probably 75 trips to Fort Lewis altogether.

Q. (By Mr. Pennington): Do you know the person who played the accordion in this troupe?

A. Yes, I do.

Q. Did they play sheet music?

A. No, they didn't use sheet music. They played from memory.

Q. They played from memory entirely?

A. Yes.

Q. There would have been no occasion for any member in this troupe, then, seeking sheet music for the accordion player?

A. Not for the accordion player, no. As a rule, we carried our music in the suitcases. We didn't carry it out. [249]

\* \* \*

### Cross-Examination

By Mr. Evans:

\* \* \*

Q. How much did you weigh at the time of this incident you are speaking of?

A. I suppose around 185.

Q. How much do you weigh now?

A. 155. [250]

\* \* \*

MRS. E. T. HOLLOWAY

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Pennington:

Q. You have heard the testimony of Mrs. Bruck with respect to an incident happening prior to the one in which Mrs. Westfall was injured; do you recall that?      A. Yes. [253]

Q. Were you on the bus on the trip at that time?

A. I was on the bus on the trip at that time.

Q. Will you explain to the Court just what happened?

A. Mrs. Bruck was sitting on a seat that goes clear across the back end of the bus. She was sitting in the center.

The Court: Where were you sitting?

The Witness: Probably on the left-hand side. I usually sat there, about halfway back. But I do remember the bus stopping very suddenly because a car went in front of it. She naturally was jolted off of her seat. But she didn't fall. She just stumbled down the aisle; and this accordion stopped her. I do remember the driver being very concerned about her and helping her off the bus.

The Court: You say the bus stopped?

The Witness: Yes.

\* \* \*

Q. (By Mr. Pennington): Mrs. Holloway, do

(Testimony of Mrs. E. T. Holloway.)

you have a definite recollection of the bus on which you were riding on the evening of February 20, 1946, the evening on which Mrs. Westfall was thrown from the [254] seat?

A. Nothing, only that it was definitely old.

Q. It definitely was an old bus? A. Yes.

\* \* \*

Q. Will you estimate the speed at which it was traveling just prior to the time of the accident?

A. On February 20, do you mean?

Q. The one on which Mrs. Westfall was hurt.

A. Well, I should say between 45 and 50 miles an hour. [255]

\* \* \*

### BARBARA WESTFALL

recalled as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Pennington:

Q. Miss Westfall, you have heard the testimony here with reference to the incident in which Mrs. Westfall was [256] thrown from her seat on an Army bus while it was on the way to Fort Lewis?

A. Yes.

Q. Do you recall that incident?

(Testimony of Barbara Westfall.)

A. Yes, I do.

Q. Will you relate what happened, please?

A. Yes. We were driving along and Mrs. Bruck was sitting in the middle of the back seat and the driver was forced by another car to stop suddenly, and Mrs. Bruck ran down the aisle and fell over some suitcases and caught herself on the back of the seat. The driver was very nice. As soon as he could he pulled off to the side of the road and wanted to know if she was hurt and wanted to know if he could take her to the hospital or anything. She said no. When we got to Fort Lewis he asked her again if she wanted to go to the hospital and he was very nice all of the way. Mrs. Bruck didn't think she was hurt. She was just surprised and shocked.

Q. Do you have a definite recollection of the bus on which you were riding on the evening that Mrs. Westfall, your mother, was thrown from the seat?

A. Well, I know it was an old bus. [257]

\* \* \*

Q. What is your recollection of the speed at which it was traveling at or just prior to the time the accident occurred?

A. On the 20th?

Q. Yes.

A. I would say he was doing 50 miles.

\* \* \*

Q. On the other incident in which Mrs. Bruck was involved, do you have any recollection as to where that occurred?

A. Well, not exactly.

(Testimony of Barbara Westfall.)

Q. Well, about where; could you give us an idea?

A. I would say after we left South Tacoma.

Q. Where did the incident involving Mrs. Westfall occur?

A. It was before we got to South Tacoma.

\* \* \*

Q. Do you recognize Mr. Yingling?

A. I think he was the driver when Mrs. Bruck was thrown from her seat when she went down the aisle. I know [258] he wasn't the other man.

Q. You know he was not the driver involved on the evening your mother was injured?

A. I am very sure of that, yes. [259]

\* \* \*

### ESTHER WESTFALL

recalled as a witness by and on behalf of the Plaintiff, having been previously duly sworn, was examined and testified further as follows:

#### Direct Examination

By Mr. Pennington:

Q. You have heard the incident related here involving Mrs. Bruck? [262]

A. Yes.

Q. Were you along on that evening, yourself?

A. Yes. The troupe didn't go out without me.

\* \* \*

Q. Did it occur substantially as related by the previous witnesses?

A. Yes, it did. And the accident happened like

(Testimony of Esther Westfall.)

the bus driver stated. This car pulled in, in front of him, and he had to slam on his brakes to stop.

\* \* \*

Q. (By Mr. Pennington): Do you recall where this incident occurred—at what point on the highway?

A. It was south of South Tacoma as you go on to Fort Lewis. [263]

\* \* \*

Q. (By Mr. Pennington): Do you recognize this driver?

A. I am confident he was the driver of the bus the night Mrs. Bruck was thrown from her seat because he was so [265] concerned about it. He asked several times if she didn't want to go to the hospital and see a doctor or something or other. He was a gentleman all the way through.

Mr. Pennington: That concludes Plaintiff's rebuttal, your Honor.

The Court: Do you have anything else?

Mr. Evans: Nothing further.

(Both sides rest.)

The Court: I am persuaded that the plaintiff has made out a case. The Court will find negligence on the part of the driver of the bus proximately causing injuries to the plaintiff and that the plaintiff, herself, was free of contributory negligence. It is the duty and the very hard duty of the Court to determine the extent of her injuries. It is particularly difficult because of the quite sharp conflict

in the testimony of these doctors. For that phase of the case I will consider and announce my conclusion later.

I want to ask counsel under what theory he hopes to recover for the special damages consisting of bills of doctors which are not paid by nor [266] chargeable to the plaintiff.

Mr. Pennington: If your Honor please, the particular item in that category is a \$114 item of the Security Medical Clinic.

I think some unnecessary confusion was injected into the case with reference to that. It was not an insurance policy and no insurance company was involved. She took the policy with the clinic and, in return, received certain medical services. It was merely a pre-payment for medical services at \$3 a month. Actually she made those payments over a period of years and was making them at the time she was receiving this treatment. So that bill plus considerable in addition to it was actually paid to the clinic to give her a coverage of medical treatment. Because that pre-payment was made, there was no actual cash transaction in the amount of \$114. We put that bill in because that was the statement submitted to us by her doctor. [267]

\* \* \*

The Court: She did definitely say she continued the payments up to 1947.

Mr. Pennington: 1947, yes.

The Court: What is your recollection on that, Mr. Evans?

Mr. Evans: My recollection there is that for

some period of time she paid the \$3. However, I would like to call the Court's attention to the case of Aetna Insurance Company vs. United States, found in Volume 338 of United States Supreme Court Decisions. I believe the page is 663, although I am not certain of the page—where the Supreme Court has held that the real party in interest is the only one that has a right to bring an action and with regard to subrogation there is no right of recovery. I don't believe there is any right of recovery for insurance premiums.

The Court: I am familiar with the case that you have in mind, Mr. Evans, but isn't this lady the real party in interest if she was paying something which entitled her to this medical service? [269]

\* \* \*

Mr. Evans: Do I understand the Court does not [271] intend to hear from counsel as to the law and the facts and the contentions of the parties in regard to this case?

The Court: Well, you have no misgivings that this is sufficient evidence if I take the evidence most strongly in favor of the plaintiff that there was negligence on the part of the driver, do you? You don't make any such contention as that?

Mr. Evans: That is a fact to be determined. But as I understand, the Court is from a foreign state and we have some laws in the state which I think will have a very material bearing upon the right to recover.

The Court: What is it you have in mind?

Mr. Evans: I have in mind particularly our

guest statute in this state and the decisions decided thereunder. I think under the decisions in the state as to what is a host-guest relationship very clearly it may be shown in this case to have existed here which bars any right of recovery whatever.

The Court: When the Army was transporting this lady down there for the purpose of rendering services for the Army, you would say she was a guest of the Army?

Mr. Evans: Under the guest statutes of [272] this state—not only guests, but licensees. Further, I would like to call the Court's attention to a case cited on December 4, 1950, by the United States Supreme Court which is a consolidation of three cases, the first of which being *Feres vs. the United States*, wherein the type of liability similar to the one here was the subject at issue.

The Court: Similar. What are the facts?

Mr. Evans: That involved three cases where the relationship of servicemen to the Army was involved. The Supreme Court goes quite at length in that case to explain that the Tort Claims Act does not create a new type of liability.

The Court: Well, no, I can see of course under that statute if a private individual wouldn't be liable under these facts then the Government of course wouldn't be liable. But it seems to me, when you come to the guest statute, and you have a situation such as this where in consideration of transportation to the Camp Lewis that these ladies and these children were going to put on a show for the soldiers, that wouldn't be within the guest statute.

Mr. Evans: The decisions of our Supreme Court here I think will clearly show that under the evidence that has been put in, in this case, and I have watched [273] it very carefully, that no other relationship exists other than host-guest.

The Court: Let me have those decisions you have in mind.

Mr. Evans: I would like to call the Court's attention to a case in 194 Washington at page 86.

The Federal case to which I am referring is *Feres vs. the United States*, decided on December 4th by the Supreme Court of the United States.

The guest statute is 663-121 of our Remington's Revised Statutes of the State of Washington.

The 194 case is entitled *Syverson vs. Berg*. Also 117 Washington 537; that is 117 Washington 2nd 537. Also 30 Washington 2nd 814; and 9 Washington 2nd 77. Those are three of the outstanding cases upon which I rely. There are others.

The Court: Are you prepared here to tell me what the facts were in those cases and how you can draw a similarity between those cases and the one at the bar?

Mr. Evans: I would have to bring the volumes down. I would want to read to the Court the quotations from the cases where they describe what a host-guest relationship is. I thought if we were going to have an argument I would have had a moment to go upstairs [274] and get them.

\* \* \*

The Court: Suppose I give you five days to prepare a short memorandum, Mr. Evans, and then

give Mr. Pennington five days to reply.

Court Reporter's Certificate

I hereby certify that as official court reporter for the United States District Court for the Western District of Washington, Northern Division, during the trial of Esther Westfall vs. United States of America, Civil action No. 2529, I stenographically recorded the testimony of all of the witnesses, together with all objections and exceptions of counsel, and the rulings of the Court thereon, and that the foregoing transcript consisting of 275 pages is a full, true and correct record of said proceedings at trial.

Dated this 1st day of June, 1951, in Seattle, Washington.

/s/ MERRITT G. DYER,  
Court Reporter.

[Endorsed]: Filed June 5, 1951. [276]

---

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO RECORD ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action, and that the same constitute the complete record on file in said cause. The papers herewith transmitted, together with Defendant Exhibits A to O, inclusive, constitute the record on appeal from the final judgment filed and entered Feb. 2, 1951, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Complaint, filed Apr. 21, 1950.
2. Praecipe for process, filed Apr. 21, 1950.
3. Marshal's Return on Summons, filed Apr. 24, 1950.
4. Appearance of defendant, filed June 19, 1950.
5. Answer of defendant, filed Sept. 28, 1950.
6. Motion deft. for Order Directing Subpoena (Yingling), filed Dec. 19, 1950.
7. Order for subpoena of Witness Yingling and payment of fees, filed Dec. 19, 1950.
8. Praecipe for subpoena, Yingling, filed Dec. 19, 1950.
9. Pre-Trial Oral Examination of Esther Westfall, filed Dec. 26, 1950.
10. Praecipe for subpoena (Bruck), filed Dec. 27, 1950.
11. Marshal's return on subpoena (Yingling), filed Jan. 2, 1951.
12. Praecipe for subpoenas, Barton et al., filed Jan. 2, 1951.
13. Marshal's Return on subpoena (Bruck), filed Jan. 4, 1951.

14. Marshal's Return on subpoena, Barton, filed Jan. 4, 1951.
15. Marshal's Return on subpoena, Deasy, filed Jan. 4, 1951.
16. Marshal's Return on subpoena, Wayman, filed Jan. 4, 1951.
17. Praeceptum for subpoena, Hoebee, et al., filed Jan. 8, 1951.
18. Praeceptum for subpoena, DeLong, filed Jan. 8, 1951.
19. Marshal's Return on subpoena, Hoebee, filed Jan. 8, 1951.
20. Praeceptum for cert. copy of Order for Subpoena of witness and payment of fees, filed Jan 8, 1951.
21. Marshal's Return on subpoena, Speeres, filed Jan. 9, 1951.
22. Memorandum of Authorities by defendant, filed Jan. 16, 1951.
23. Memorandum Brief of Authorities, filed Jan. 22, 1951.
24. Memorandum opinion of Judge Lemmon, filed Jan. 25, 1951.
25. Supplemental Memorandum of Judge Lemmon, filed Jan. 30, 1951.
26. Findings of Fact and Conclusions of Law, filed Feb. 2, 1951.
27. Judgment for Plaintiff, filed Feb. 2, 1951.
28. Amendment to Memorandum by Judge Lemmon, filed Feb. 5, 1951.
29. Memorandum of Costs and Disbursements, filed Feb. 6, 1951.

30. Motion of deft. to set Aside Court's Decision and Enter Judgment in Favor of Defendant or in the Alternative Granting a New Trial, filed Feb. 9, 1951.

31. Memorandum of Costs and Disbursements, Amended, filed Feb. 12, 1951.

32. Opening Memorandum of Authorities in Support of Motion for New Trial, filed Feb. 27, 1951.

33. Memorandum of Authorities in Opposition to Defendant's Motion to Set Aside the Court's Decision and Enter Judgment in Favor of the Defendant, or, in the Alternative to Grant a New Trial, filed Mar. 9, 1951.

34. Reply Memorandum of defendant, filed Mar. 13, 1951.

35. Order denying Motion for New Trial, filed Mar. 22, 1951.

36. Notice of Appeal of defendant, filed Mar. 23, 1951.

37. Marshal's Return on subpoena, DeLong, filed Mar. 27, 1951.

38. Motion, defendant, to Extend Time for Docketing Record on Appeal, filed Apr. 13, 1951.

39. Note for Motion Docket, on above motion, filed Apr. 13, 1951.

40. Order Extending Time for Docketing Record on Appeal, filed Apr. 17, 1951.

41. Transcript of Proceedings at Trial, Volume I, filed June 5, 1951.

42. Transcript of Proceedings at Trial, Volume II, filed June 5, 1951.

43. Order transmitting original exhibits, filed June 7, 1951.

I certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal herein on behalf of defendant, to wit:

Notice of Appeal.....\$5.00,

and that this amount has not been paid to me for the reason that the appeal herein is being prosecuted by the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 7th day of June, 1951.

MILLARD P. THOMAS,  
Clerk.

[Seal] By /s/ TRUMAN EGGER,  
Chief Deputy.

---

[Endorsed]: No. 12966. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Esther Westfall, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed June 9, 1951.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals for  
the Ninth Circuit

No. 12966

UNITED STATES OF AMERICA,

Appellant,

vs.

ESTHER WESTFALL,

Appellee.

POINTS TO BE RELIED UPON ON APPEAL

Comes now the appellant, United States of America and states that the following points will be relied upon on appeal in the above-entitled cause:

1. The Court erred in failing to dismiss the appellee's complaint for the reason that the same was barred by the statute of limitations of the State of Washington.

2. The Court erred in failing to find that the appellee's cause of action is barred because of laches on the part of the appellee.

3. The Court erred in failing to apply the guest statute of the State of Washington, Section 6360-121, Remington's Revised Statutes of Washington, which denied the appellee the right to recover.

4. The Court erred in allowing the plaintiff \$250.00 as special damages for the reason that there was no proof of such special damages.

5. The Court erred in allowing appellee to re-

cover as a part of her special damages, the doctor bill of Dr. Seering when the same was covered by an insurance policy which carried the right of subrogation to the insurer.

6. The Court erred in allowing appellee to recover as a part of her special damages for the services rendered by doctors who examined appellee solely for the purpose of testifying at the trial.

7. The Court erred in allowing the appellee to recover as special damages for various and sundry drugs and bandages when there was no proof of such damages.

8. The general damages in the sum of \$7,500.00 allowed by the Court were excessive in view of the injuries alleged to have been suffered by the appellee.

9. The Court erred in finding that the Government's bus driver was negligent.

10. The Court erred in failing to find that the appellee was guilty of contributory negligence.

11. The Court erred and abused its discretion in failing to grant the appellant a new trial because of accident and surprise which occurred during the trial and which ordinary prudence could not have guarded against.

12. The Court erred in failing and refusing to allow counsel to argue the facts of the case at the conclusion of the evidence.

13. The Court erred in failing to require ap-

pellee to prove her case by a preponderance of the evidence and in finding in favor of the appellee upon taking her testimony in its most favorable light.

14. The Court erred in refusing to allow Mrs. Deasy and Mr. Barton to testify with regard to reports they had submitted dealing with the appellee's physical condition at a time when their knowledge of her condition was very fresh in their memories.

15. The Court erred in granting judgment in favor of the appellee.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ VAUGHN E. EVANS,  
Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 9, 1951.

---

[Title of Court of Appeals and Cause.]

APPLICATION FOR LEAVE TO HAVE EXHIBITS CONSIDERED IN ORIGINAL FORM AND NOT PRINTED AS A PART OF THE RECORD

Comes now the appellant, United States of America, and makes application for leave of the Court to have the following exhibits considered in their

original form but not printed as a part of the printed record:

Exhibit A—Picture of interior of a bus.

Exhibit B—Picture of interior of a bus.

Exhibit C—Picture of interior of a bus.

Exhibit E—Photostat of application for employment.

Exhibits G through L—X-rays.

Exhibit N—Army Field Manual.

Exhibit O—An Army Regulation.

This application is based upon the affidavit of Vaughn E. Evans attached hereto.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ VAUGHN E. EVANS,  
Of Counsel.

State of Washington,  
County of King—ss.

Vaughn E. Evans, being first duly sworn, upon oath deposes and says:

That he was the Assistant United States Attorney who tried this action and that he is familiar with the exhibits on file with the Clerk of this Court; that in his opinion the exhibits set forth in the foregoing application can be adequately considered by the Court in their original form and that the cost of reproducing the same as part of the printed record would be out of proportion to the benefit which might be derived therefrom;

That Exhibits A, B, and C are pictures which

would require the preparation of a cut; that Exhibit E is a photostat of a document for which a cut would have to be prepared in order to print the same; that Exhibits G through L are X-rays which your affiant understands can only be properly examined in their original form; that Exhibit N is an Army Field Manual containing well over a hundred pages, only a few pages of which are relevant in this action; that Exhibit O is a pamphlet containing a portion of the Army Regulations, only one or two paragraphs of which are relevant in this appeal.

/s/ VAUGHN E. EVANS.

Subscribed and sworn to before me this 6th day of June, 1951.

[Seal]     /s/ KENNETH J. SELANDER,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 12, 1951.

---

[Title of Court of Appeals and Cause.]

### ORDER RE EXHIBITS

This matter having come on on application of the appellant for permission to have the Court consider Exhibits A, B, C, E, G through L, N, and O in their original form and further that such exhibits not be printed as a part of the record and the

Court being fully advised in the premises, it is hereby

Ordered that Exhibits A, B, C, E, G through L, N, and O be considered in their original form and not printed as a part of the record in this appeal.

Done this 11th day of June, 1951.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

Judges, United States Court of Appeals for the  
Ninth Circuit.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 12, 1951.